No. 17-530

In the Supreme Court of the United States

WISCONSIN CENTRAL, LTD., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether income realized by railroad employees upon the exercise of non-qualified stock options that petitioners granted to them in the course of employment is taxable "compensation" under the Railroad Retirement Tax Act, 26 U.S.C. 3231(e).

PARTIES TO THE PROCEEDING

The petitioners are Wisconsin Central, Ltd., Grand Trunk Western Railroad Company, and Illinois Central Railroad Company, all of which are subsidiaries of Canadian National Railway Company.

The respondent is the United States of America.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 856 F.3d 490. The order and opinion of the district court (Pet. App. 16a-42a) is reported at 194 F. Supp. 3d 728.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 2017. A petition for rehearing was denied on July 12, 2017 (Pet. App. 14a-15a). The petition for a writ of certiorari was filed on October 6, 2017, and was granted on January 12, 2018. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutes and regulations are reprinted in an appendix to this brief. App., *infra*, 1a-53a.

STATEMENT

1. a. The Railroad Retirement Tax Act (RRTA), 26 U.S.C. 3201 *et seq.*, funds a statutory program of retirement benefits for railroad employees through a tax on those employees' "compensation," defined as "any form of money remuneration paid to an individual for services rendered as an employee to one or more employers." 26 U.S.C. 3231(e)(1); see 26 U.S.C. 3201(a) and (b) (2012 & Supp. IV 2016).

In structure and purpose, the RRTA largely parallels the social security system, from which railroad employees are exempt. See 26 U.S.C. 3121(b)(9). Tier 1 of the RRTA taxes railroad employees' compensation at a rate identical to the rate at which non-railroad employees' wages are taxed to fund social security under the Federal Insurance Contributions Act (FICA), 26 U.S.C. 3101 *et seq.* See 26 U.S.C. 3201(a). Under the companion benefits statute, the Railroad Retirement Act of 1974 (RRA), 45 U.S.C. 231 *et seq.*, RRTA taxes are used to fund benefits identical to those provided under social security. 26 U.S.C. 3201(a), 3221(a); 45 U.S.C. 231b(a)(1). As in the social security system, taxes are pooled to fund all benefits, and the taxes paid by and on behalf of an employee do not necessarily correlate with the benefits that the employee later receives. *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572, 575-576 (1979). The RRTA also imposes an additional "Tier 2" tax, which funds benefits that are similar to a private pension. *Ibid.*; see 26 U.S.C. 3201(b), 3221(b) (Supp. IV 2016). An employee's Tier 2 benefits are linked to the amount of tax collected, investment returns, and years served in the railroad industry. *Ibid.*

Congress began work on the railroad-retirement system in the early 1930s before it created the social security program. Kevin Whitman, *An Overview of the Railroad Retirement Program*, 68 Soc. Sec. Bull. No. 2, at 41 (2008) (Whitman). Pension plans became widespread in the railroad industry before many other industries. *Ibid.* The railroad pension plans varied in their structure and funding mechanisms. See 2 Staff of the House Comm. on Interstate and Foreign Commerce and the Senate Comm. on Labor and Pub. Welfare, 92d Cong., 2d Sess., *The Railroad Retirement System: Analysis of its Historical Development, Statistical Trends, Structure, and Adequacy*, at 8-12 (Joint Comm. Print 1972) (Joint Committee Print); Murray Webb Latimer, *Industrial Pension Systems in the United States and Canada* 30-31 (1932); *Retirement Policies and the Railroad Retirement System*, S. Rep. No. 6, 83d Cong., 1st Sess. Pt. 1, at 64 (1953) (Douglas Report). But they were generally designed without "adequate financial and actuarial planning" and were severely underfunded. Joint Committee Print 15; see Whitman 41; see also, *e.g.*, *BNSF Ry. Co.* v. *United States*, 775 F.3d 743, 749-750 (5th Cir. 2015). When the Great Depression began, the "already unstable" plans spiraled into "a state of crisis," Whitman 41; see Joint Committee Print 16.

Congress responded to these problems by seeking to establish a financially stable pension system for railroad workers. Because the planned social security system would operate only prospectively and would not begin paying benefits for several years, Congress enacted separate railroad-retirement legislation. *BNSF*, 775 F.3d at 750. In 1934 and 1935, it enacted versions of the RRTA that were invalidated by courts applying pre-New-Deal understandings of Congress's powers

under the Commerce Clause and other constitutional provisions. *Railroad Ret. Bd.* v. *Alton R.R.*, 295 U.S. 330 (1935); *Alton R.R.* v. *Railroad Ret. Bd.*, 16 F. Supp. 955 (D.D.C. 1936); see *Hisquierdo*, 439 U.S. at 574 n.3. But the 1937 package of railroad-pension legislation that Congress enacted survived. That package included the Carriers Taxing Act of 1937, ch. 405, 50 Stat. 435, which as amended and renamed is today's RRTA, and an accompanying benefits statute, the Railroad Retirement Act of 1937, ch. 382, 50 Stat. 307, which forms the basis for today's RRA.

Shortly after those provisions were enacted, the Department of Treasury, which administers the RRTA, and the U.S. Railroad Retirement Board (Board), which administers the RRA, issued regulations and other guidance. In 1937, the Department of Treasury issued a regulation that construed taxable "compensation" under the RRTA as "all remuneration in money, or in something which may be used in lieu of money," and that offered as examples "scrip and merchandise orders." Treas. Reg. 100, Art 5 (1937); see 26 C.F.R. 410.5 (1938). That regulation remained in place until 1994. In that year, after numerous statutory amendments spanning 57 years had largely aligned the scopes of the RRTA and the FICA, the Department of Treasury issued a new regulation providing that, "except as specifically limited by the [RRTA] * * * or regulation," compensation under the RRTA "has the same meaning as the term wages in [FICA] section 3121(a)." 26 C.F.R. 31.3231(e)-1(a)(1). Subject to enumerated exceptions, the FICA defines "wages" as "all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash." 26 U.S.C. 3121(a) (2012 & Supp. IV 2016).

Shortly after the RRTA and RRA were enacted, the Board issued a regulation providing that payment "in the form of a commodity, service, or privilege" would qualify as "compensation" under the RRA—whose definition of compensation is identical to the one contained in the RRTA—so long as the employer and employee agreed in advance that the employee's compensation would include the in-kind benefit and agreed in advance on the benefit's value. 20 C.F.R. 222.2 (1938). That regulation is still in effect. 20 C.F.R. 211.2(a). The year after the RRTA and RRA were enacted, the Board issued a legal opinion indicating that stock-based compensation could qualify as "money remuneration." Board G.C.M. L-38-440 (Apr. 22, 1938). The Board maintains that position today. Board G.C.M. L-2005-25, at 5-7 (Dec. 2, 2005).

Although Congress has enacted numerous amendments to the RRTA's definition of "compensation," it has left intact the definition's reference to "any form of money remuneration." Congress has created exemptions, however, for particular kinds of non-currency compensation. For example, Congress has exempted from RRTA taxation a particular kind of stock option—"incentive" or "[q]ualified" stock options, 26 U.S.C. 3231(e)(12)—which often receive favorable treatment under the tax code, and are generally defined in contradistinction to "nonqualified stock options" (NQSOs). Congress has also exempted particular types of in-kind benefits, such as employee achievement awards in the form of tangible personal property, 26 U.S.C. 3231(e)(5); certain meals and lodging, 26 U.S.C. 3231(e)(9); and health insurance, 26 U.S.C. 3231(e)(1)(i).

b. A stock option gives an employee the right to acquire company stock at a fixed price, known as the

"strike price," at a specified time or when specified conditions are met. *Black's Law Dictionary* 1268 (10th ed. 2014); see Pet. App. 2a-4a. The option has value when it is exercised if the strike price is lower than the market value of the stock. In that event, the value of the option is equal to the difference between the strike price and the market value of the stock at exercise. See Pet. App. 2a-4a.[1]

When an employee participating in petitioners' stock-option programs exercises an option, the employee can elect either to pay the strike price and receive the stock or to "have an agent exercise [the] employee's stock option, sell the shares of stock obtained by that exercise of the option, reserve part of the money received in the sale for taxes and administrative costs, and deposit the balance in the employee's bank account." Pet. App. 3a-4a. An employee who chooses the latter mechanism will "experience the stock option as a cash deposit." *Id.* at 4a.

Today, stock-based compensation like options often constitutes the lion's share of compensation for high-level executives. See Brian J. Hall & Jeffrey B. Liebman, *The Taxation of Executive Compensation*, in 14 Tax Pol'y & Econ. 4 (2000) (*Executive Compensation*) (describing predominant role of options in executive compensation); Lucian Bebchuk & Yaniv Grinstein, *The Growth of Executive Pay*, 21 Oxford Rev. of Econ. Pol'y No. 2, at 283-303 (2005) (*Growth of Executive Pay*) (same). That is true in the railroad industry. For ex-

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[1] Accordingly, for income-tax purposes, an employee who exercises an NQSO realizes as income the fair market value of the shares received, less the amount that the employee must pay for the shares. See 26 U.S.C. 83(a).

ample, Canadian National Railway Company, petitioners' parent company, paid its president more than $2 million in stock and more than $1.6 million in option-based awards in 2016, while paying him a salary of about $835,000.[2] In that same year, Union Pacific paid its CEO $1 million in salary, a $1.85 million bonus, and $7 million in stock and stock options.[3] CSX paid its CEO $1.2 million in salary and more than $8.6 million in stock awards and stock options.[4]

For many years, "railroads around the country, including petitioners," treated "non-qualified stock options" as "'money remuneration' under the RRTA and accordingly paid RRTA tax on" the value of the options exercised by the companies' employees. Pet. App. 36a (citation omitted); see *Union Pac. R.R.* v. *United States*, 2016 U.S. Dist. LEXIS 86023, at *4-*5 (D. Neb. July 1, 2016) (observing that Union Pacific issued stock options beginning in tax year 1981 and paid RRTA taxes on the options "without challenge" until filing a refund suit in 2014 concerning tax years 1991 to 2007), rev'd, 865 F.3d 1045 (8th Cir. 2017), petition for cert. pending, No. 17-1002 (filed Jan. 18, 2018). "[I]n recent years,"

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[2] Canadian Nat'l Ry. Co., *Management Information Circular* 55 (Apr. 2017), https://www.cn.ca/-/media/Files/Investors/Investor-Shareholder/information-circular-2017-en.pdf?la=en. Canadian National Railway's other high-ranking executives were also paid mostly in stock and stock options. See *ibid.*

[3] Union Pac. Corp., *Schedule 14A, 2017 Annual Meeting of Shareholders Proxy Statement* 54 (Mar. 2017), https://www.sec.gov/Archives/edgar/data/100885/000010088517000078/unp-20170329xdef14a.htm.

[4] CSX Corp., *Schedule 14A, 2017 Proxy Statement* 65 (Apr. 2017), https://www.sec.gov/Archives/edgar/data/277948/000120677417001259/csx3110061-def14a.htm.

however, several railroads have filed refund suits asserting that employees who exercise NQSOs do not receive taxable compensation under the RRTA because stocks are not a "form of money remuneration." Pet. App. 20a.

2. a. This is one of those suits. Petitioners are subsidiaries of Canadian National Railway Company and operate railroads in the United States. Pet. App. 17a; Pet. 7. Since 1996, petitioners have compensated some employees using NQSOs that permit those employees to acquire shares in the parent company, whose stock is traded on the New York Stock Exchange. *Id.* at 2a, 17a-18a; J.A. 37.

In 2014, petitioners filed suit against the federal government, seeking about $13 million in tax refunds. Pet. App. 20a; Pet. 9. They alleged that they had overpaid RRTA taxes by paying taxes on the income that their employees realized when they exercised their NQSOs. Pet. App. 2a, 17a, 20a. They sought refunds of the employer and employee portions of RRTA taxes that petitioners had paid on income from those options between 2006 and 2013. *Ibid.*

b. The parties filed cross-motions for summary judgment on stipulated facts, and the district court awarded summary judgment to the government. Pet. App. 17a-42a. The court applied the framework set out in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Pet. App. 20a. It found the phrase "any form of money remuneration" ambiguous as applied to compensation through stock options like NQSOs. The court noted that the government had cited dictionary definitions of "money" that encompassed such options, *id.* at 23a-24a (discussing *Oxford English Dictionary* and *Black's Law Dictionary*), while petitioners had cited definitions of "money"

that were narrower, *ibid.* (discussing *Oxford English Dictionary* and *Merriam-Webster Dictionary*).

The district court further explained that the express exclusion of certain types of stock options and of other non-cash benefits from the RRTA's definition of "money remuneration" supported the government's reading of the statute. Pet. App. 25a. The court observed that "Congress would have had no need to carve" out exceptions for qualified stock options and other non-cash compensation "if it did not consider" the things excepted to be a "form of money remuneration" in the first place. *Id.* at 27a-28a.

The district court also observed that the parallels between the RRTA and the FICA supported a construction of the RRTA that would give the statutes a similar reach. Pet. App. 30a-31a. The court further stated that "[c]ommon sense" supported treating the provision of stock options as money remuneration because "[s]tock options are financial instruments" that "are readily and regularly convertible into cash." *Id.* at 38a. The court also observed that this reading "eliminates the possibility that railroads could structure their compensation packages in such a way as to substantially reduce their RRTA tax burden." *Id.* at 39a.

c. The court of appeals affirmed. Pet. App. 1a-5a. The court held that the RRTA's definition of "compensation" encompasses "the value of stock options exercised by [petitioners'] employees." *Id.* at 2a; see *id.* at 2a-5a. The court rejected petitioners' argument that the phrase "any form of money remuneration" refers solely to cash and a narrow set of cash equivalents. *Id.* at 3a-4a. And it observed that stock today is the "practical equivalent" of cash. *Id.* at 4a.

The court of appeals explained that the RRTA's exclusion for qualified stock options "supports an inference that *non-qualified* stock options, which are the options at issue in this case, are covered by the term 'money remuneration' and are therefore taxable." Pet. App. 4a-5a. The court found that conclusion to be "reinforce[d]" by the statutory exceptions for other types of non-cash benefits, like health care, employee achievement awards of tangible property, and certain meals and lodging. *Id.* at 5a. The court explained that the government's position also made "practical sense" because it avoids "the creation of a tax incentive that might distort the ways in which employers structure compensation packages." *Ibid.* And it observed that its reading accorded with other decisions addressing the classification of stock options under the RRTA. *Ibid.* (citing *BNSF*, 775 F.3d at 757; *CSX Corp.* v. *United States*, No. 15-cv-427, 2017 WL 2800181 (M.D. Fla. May 2, 2017), appeal pending, No. 17-12961 (11th Cir. docketed June 6, 2017).

Judge Manion dissented. Pet. App. 5a-13a. In his view, the term "money remuneration" unambiguously excludes compensation through stock options. *Id.* at 7a-9a. He found irrelevant the statutory exclusions from "compensation" for qualified stock options and other non-cash remuneration, principally on the ground that those exclusions had been added to the RRTA years after Congress enacted the statute's basic definition of RRTA "compensation." *Id.* at 10a-12a.

SUMMARY OF ARGUMENT

Petitioners' compensation of employees in publicly traded stock through NQSOs constitutes taxable compensation under the RRTA.

A. The RRTA defines taxable "compensation" as "any form of money remuneration paid to an individual for services rendered as an employee," and then sets out numerous exclusions, including exclusions for a particular type of stock option and for specified types of in-kind benefits. 26 U.S.C. 3231(e). Under the RRTA's definition of taxable "compensation," remuneration of an employee through publicly traded stock is taxable.

1. The phrase "any form of money remuneration" encompasses payments in publicly traded stocks. Dictionaries around the time of the RRTA's enactment often defined "money" as encompassing property, such as stock, that can be readily valued or converted to currency. Petitioners emphasize that "money" was also used in a narrower sense as referring to any "medium of exchange." But publicly traded stocks fit that definition as well. Stocks were used as a medium of exchange in corporate and employee-compensation matters when the RRTA was enacted, and today, they are the predominant medium of exchange in some employee-compensation and business contexts. That widespread use reflects that stock today functions as the "practical equivalent" of currency. Pet. App. 4a. Indeed, railroad employees who exercise stock options can simply opt to have the value of their options (less taxes and fees) deposited into their bank accounts as cash. *Id.* at 3a-4a.

The question whether "money" can encompass stock often arose in judicial decisions around the time of the RRTA's enactment when courts interpreted wills that conveyed "money." Courts recognized that "money" was a flexible term with broader and narrower meanings, and they often held that conveyances of "money" encompassed stocks and similar instruments—even

though at the time of the RRTA's enactment, such instruments were less liquid and less widely used as mediums of exchange than today. Statutory definitions of "money" that encompass stock also confirm that "money" can be understood to reach such instruments.

2. The statutory carve-outs from the RRTA's basic definition of "compensation" confirm that "any form of money remuneration" includes payments to employees in publicly traded stocks. Especially relevant is the carve-out for qualified stock options. That exception would be unnecessary if stock-based compensation was not "money remuneration" to begin with. Petitioners' view would also render wholly or partially superfluous the RRTA carve-outs for in-kind benefits such as employer-provided meals and lodging, employee achievement awards in the form of tangible property, and employer-provided health and disability insurance.

B. Historical practice also indicates that payments in stock qualify as taxable compensation under the RRTA.

1. Congress first defined "compensation" as "any form of money remuneration" in 1935 railroad-retirement legislation that consisted of tax and benefits statutes paralleling the RRTA and RRA. Early versions of the 1935 benefits statute defined "compensation" as "[a]ny form of money remuneration for active service received by an employee from a carrier, including salaries, commissions, and the reasonable value of board, rents, lodging, and other similar advantages furnished for subsistence of the employee while in service," while excluding "the value of such boards, rents, housing, lodging, and other similar advantages combined which is less than $10 for any calendar month," in addition to "free transportation." S. 2862, 74th Cong., 1st Sess., § 1(e), at 3 (1935) (defining "compensation"); see H.R. 8121, 74th

Cong., 1st Sess., § 1(e), at 3 (1935). The 1935 Congress ultimately enacted a simpler definition of "compensation," which omitted illustrative examples of money remuneration and the carve-out for certain smaller-value in-kind benefits. But the proposed bills demonstrate an understanding that "any form of money remuneration" naturally includes readily-valued in-kind compensation.

In addition, the RRTA and RRA predecessors that Congress did enact in 1935 defined compensation as "any form of money remuneration," but then expressly excluded "free transportation." That exclusion reflects, at minimum, Congress's understanding that "any form of money remuneration" could be read to reach railroad workers' transportation privileges if no exclusion existed.

2. Agency interpretations that have been ratified by Congress reflect the understanding that RRTA compensation includes stock. In 1937, the Department of Treasury issued a regulation defining "compensation" in the RRTA to include "all remuneration in money" as well as "something which may be used in lieu of money (scrip or merchandise orders, for example)." 26 C.F.R. 410.5 (1938); Treas. Reg. 100, Art. 5 (1937). "Scrip" at the time of the RRTA's enactment principally referred to certificates of stock ownership.

In addition, the Board issued regulations construing the identical definition of compensation in the RRA as including certain in-kind benefits with readily ascertainable values. The Board's 1938 regulations provided that "amounts to be paid in the form of a commodity, service, or privilege" qualified as "compensation" so long as the employer and employee had agreed in advance that part of the employee's compensation would

be paid "in the form of such commodity, service, or privilege" and had agreed "upon the value of such commodity, service, or privilege." 20 C.F.R. 222.2 (1938). The Board also issued an opinion in 1938 determining that stock can qualify as money remuneration. Board G.C.M. L-38-440, at 2.

These contemporaneous interpretations constitute evidence of the original public meaning of "money remuneration" under the RRTA and RRA. In the ensuing years, Congress has enacted numerous amendments to the RRTA and RRA without altering or calling into question the agencies' determination that non-cash benefits like stock can constitute "money remuneration." Under these circumstances, "the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" *CFTC* v. *Schor*, 478 U.S. 833, 846 (1986) (citation omitted).

C. Treating payments of publicly traded stock as taxable "compensation" under the RRTA furthers the statute's objectives. The RRTA and RRA were enacted to provide a financially stable, self-sustaining system of retirement benefits for railroad workers. As this Court has explained in the context of social security, the aim of providing a financially sound and self-sustaining pension system counsels against "constricted interpretation of the phrasing" of the applicable taxing statute, because such interpretation would "invite adroit schemes by some employers and employees to avoid the immediate burdens at the expense of the benefits sought by the legislation." *United States* v. *Silk*, 331 U.S. 704, 712 (1947). That reasoning applies here. Construing "any form of money remuneration" to exclude highly liquid cash substitutes would enable employers

to "avoid the immediate burdens" of RRTA taxation, at the expense of adequately funding retirement benefits. *Ibid.*

D. Regulations reinforce that RRTA "compensation" includes compensation in publicly traded stocks. Since 1994, Department of Treasury regulations have provided that "compensation" in the RRTA "has the same meaning as the term wages" in the FICA, "except as specifically limited by the [RRTA]" or by regulation. 26 C.F.R. 31.3231(e)-(1)(a) (emphasis omitted). In adopting that rule, the agency emphasized that decades of statutory amendments had brought the FICA and the RRTA together, including by "conforming the structure of the RRTA to parallel that of the FICA." 59 Fed. Reg. 66,188 (Dec. 23, 1994). Since NQSOs are taxable under the FICA, and not specifically excluded from taxation under the RRTA, the regulation supports the conclusion that income from NQSOs is taxable under the RRTA.

The Board's longstanding regulation defining "compensation" under the RRA also undermines petitioner's claim that stock options are not taxable "compensation." Since 1938, the Board has construed "any form of money remuneration" to encompass payments in the form of a "commodity, a service, or a privilege." 20 C.F.R. 211.2(a). That definition is inconsistent with petitioners' contention that "money remuneration" encompasses only payments in the types of mediums of exchange that are used for everyday purchases.

ARGUMENT

An employer's provision to an employee of publicly traded stock through an NQSO is taxable "compensation" under the RRTA.

A. The RRTA's Definition Of Taxable "Compensation" Encompasses An Employer's Provision Of Publicly Traded Stock

The RRTA defines taxable "compensation" as "any form of money remuneration paid to an individual for services rendered as an employee," and then sets out numerous exclusions from that definition, including exclusions for income from a particular type of stock option and for various in-kind benefits. 26 U.S.C. 3231(e). Petitioners argue that their employees do not receive taxable "compensation" under the RRTA when they receive stock through NQSOs because stock is not a "form of money remuneration." But dictionary definitions of "money" encompass stock, which is readily convertible to currency and serves as a common medium of exchange in business transactions. And the RRTA's exclusions, including the exclusion for income from certain stock options, reinforce the conclusion that the RRTA's definition of compensation reaches the stock-based compensation here.

1. The phrase "any form of money remuneration" encompasses an employer's provision of publicly traded stock

a. i. Dictionaries from the 1930s contain both broader and narrower definitions of "money." The broader definitions encompass forms of property, including stock, that can be readily valued or converted into currency. See, *e.g.*, 6 *The Oxford English Dictionary* 603 (1931) (reprinted 1978) ("property or possessions of any kind viewed as convertible into money or having value expressible in terms of money"); *Black's Law Dictionary* 1200 (3d ed. 1933) ("the representative of commodities of all kinds * * * and of everything that can be transferred in commerce"); 1 *The New Century*

Dictionary of the English Language 1063 (1933) ("property considered with reference to its pecuniary value"); *Webster's New International Dictionary* 1583 (2d ed. 1934) (*Webster's Second*) ("capital considered as a cash asset; specif[ically] such wealth or capital dealt in as a commodity to be loaned, invested, or the like"). "Money" is still used in that way today. See, *e.g.*, *Webster's Third New International Dictionary* 1458 (1993) ("assets or compensation in the form of or readily convertible to cash"); *Black's Law Dictionary* 1021 (7th ed. 1999) ("[a]ssets that can be easily converted to cash"). The RRTA's inclusive reference to "any form of money remuneration" further indicates that Congress intended to reach all forms of compensation that can be described as money. See *United States* v. *Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 7 (2008) (use of "any" signaled that "Congress meant the statute to have expansive reach").

Petitioners suggest (Br. 28-29) that this common definition of "money" renders the term superfluous in the context of the RRTA. To be sure, the word "money" is sometimes used in a manner that adds no independent meaning (as in the phrase "money damages"). See *BNSF Ry.* v. *United States*, 775 F.3d 743, 753 & n.72 (5th Cir. 2015); see also Bryan A. Garner, *A Dictionary of Modern Legal Usage* 571 (2d ed. 1995). But as the court below noted, "money" serves a limiting function in the RRTA context, Pet. App. 3a, by confining taxable "compensation" to payments or benefits that can be easily valued in or converted to cash.

At the time the RRTA was enacted, that limitation performed an especially significant role in the context of the railroad industry. When Congress was considering railroad pension legislation, railroad workers were

known to have special employment advantages and fringe benefits that could not be readily assigned a cash value. See *Taxation of Interstate Carriers and Employees: Hearings on H.R. 8652 Before the House Comm. on Ways and Means*, 74th Cong., 1st Sess. 6, 9 (1935) (*H.R. 8652 Hearings*) (describing seniority protections, guarantees of an eight-hour workday, lifetime transportation privileges, and rights to safety appliances); *Taxation of Interstate Carriers and Employees: Hearings on S. 3150 Before Senate Comm. on Finance*, 74th Cong., 1st Sess. 4, 23 (1935) (same). After the RRTA was enacted, the Board determined that in-kind compensation in the form of a "commodity, service, or privilege" would qualify as money remuneration only if the employment agreement established the value of the benefit. 20 C.F.R. 222.2 (1938); see pp. 38-41, *infra* (discussing the Board's interpretation of "any form of money remuneration").

When a statutory definition is itself ambiguous, "it is not unusual to consider the ordinary meaning of a defined term" as one factor bearing on the resolution of that ambiguity. *Bond* v. *United States*, 134 S. Ct. 2077, 2091 (2014). An employer's provision of stock or stock options in return for an employee's labor falls in the heartland of the usual understanding of the term "compensation." See, *e.g.*, *Black's Law Dictionary* 342 (10th ed. 2014) (first definition of "compensation" is "[r]emuneration and other benefits received in return for services rendered; esp., salary or wages"). That usual understanding of the defined term, like other aspects of the statutory context in which the definition appears, bears on the appropriate reading of "money remuneration" in the definitional provision. See *Johnson* v. *United States*, 559 U.S. 133, 140 (2010).

ii. As petitioners observe (Br. 3, 16, 20-21), the term "money" is also used in a narrower sense to refer to a "medium of exchange." See, *e.g.*, *Webster's Second* 1583 ("[a]nything customarily used as a medium of exchange and measure of value, as sheep, wampum, copper rings, quills of salt, or of gold dust, shovel blades, etc."); see also Henry Cecil Wyld, *The Universal Dictionary of the English Language* 741 (1932) ("Any recognized medium of exchange and measure of value"); *Bouvier's Law Dictionary* 814 (Baldwin's Student ed. 1934). But stock in publicly traded companies falls within even this narrower definition. When the RRTA was enacted, stocks were already used as a medium of exchange in the corporate transactions and employee-compensation matters that are the RRTA's focus. See, *e.g.*, *Bonham* v. *Commissioner*, 89 F.2d 725 (8th Cir. 1937) (corporate transaction); *Prescott* v. *Commissioner*, 76 F.2d 3 (5th Cir. 1935) (same); see also *Commissioner* v. *Smith*, 324 U.S. 177 (1945) (employee compensation); *Chaplin* v. *Commissioner*, 136 F.2d 298 (9th Cir. 1943) (same). Consistent with that use, the legal dictionary that petitioners invoke for the principle that money refers to "'common medium[s] of exchange in a civilized nation,'" Pets. Br. 22, states that "[f]or many purposes bank notes; treasury notes and national bank notes * * * negotiable notes; securities; and bonds; will be considered as money," *Bouvier's Law Dictionary* 814 (citations omitted).

Publicly traded stocks are an even more common medium of exchange now than they were when the RRTA was enacted. "Today, nearly all top executives of large companies receive stock options, and the average stock-option grant is now larger for most top executives than salary and bonus combined." *Executive Compensation*

4; *Growth of Executive Pay* 283-303. Stock-based compensation plays that role in the railroad industry, forming the bulk of compensation for the top officials at petitioners' parent company and at other leading railroads. See pp. 6-7, *supra*. And stock is now the most common medium of exchange in other types of business transactions as well. See, *e.g.*, Gregor Andrade et al., *New Evidence and Perspectives on Mergers*, 15 J. Econ. Perspectives 103, 105-106 (Spring 2001) (determining that "[a]bout 70 percent of all deals in the 1990s involved stock compensation, with 58 percent entirely stock financed").

Those practices amply support the court of appeals' characterization of publicly traded stock as the "practical equivalent" of currency. Pet. App. 4a. Indeed, under petitioners' stock-option program and many others, employees exercising options can elect simply to have cash deposited to their bank accounts and thereby "experience the stock option as a cash deposit." *Id.* at 3a-4a. "Approximately 90-95% of the time," for instance, BNSF Railway employees exercising stock options would "sell the share at the same time, such that the employee would only receive the difference between the strike price and the exercise price." *BNSF*, 775 F.3d at 747. Among CSX employees, the figure was 93%. *CSX Corp.* v. *United States*, No. 15-cv-427, 2017 WL 2800181, at *2 (M.D. Fla. May 2, 2017), appeal pending, No. 17-12961 (11th Cir. docketed June 6, 2017). Petitioners' apparent position is that their stock-option programs will not result in "money remuneration" even when an employee chooses the cash-deposit mechanism rather than taking ownership of the stock. Acceptance of that position would elevate form over substance and create an obvious avenue for circumvention of the RRTA tax.

Petitioners suggest (Br. 24) that the RRTA's definition of "compensation" cannot encompass stock because stock would not have been viewed as "money" when the statute was enacted. But that argument would lack merit even accepting the narrow medium-of-exchange definition that petitioners posit, both because stock was sometimes used as a medium of exchange even in 1937, see p. 19, *supra*, and because "the instruments that comprise" mediums of exchange can "change over time," Pet. App. 4a. Indeed, petitioners acknowledge that some methods of compensation qualify as "money remuneration" today even though they would have been unknown to a Depression-era railroad worker. Pets. Br. 23-24 (discussing "wire transfers, electronic direct deposits, and so forth").

Petitioners also suggest (Br. 23) that publicly traded stocks are not a "medium of exchange" today because they are not used for everyday transactions such as buying groceries or paying rent. In construing the RRTA, however, the more pertinent fact is that stock is often used as a medium of exchange for employee compensation and business transactions. In any event, the term "money remuneration" cannot reasonably be construed as limited to forms of compensation that can be directly exchanged for goods or services. For example, an employee generally cannot hand over a paycheck to buy groceries or pay rent, yet petitioners accept (*ibid.*) that such bank drafts constitute "money remuneration."

b. During the era in which the RRTA was enacted, the question whether the term "money" encompassed stock often arose when courts interpreted wills that conveyed "money." Courts during that period treated the term "money" as "essentially ambiguous" because it

could be used "in its narrow sense as cash" but was "often given a broader and more elastic meaning." George W. Thompson, *The Law Of Wills And The Manner Of Their Drafting, Execution, Probate And Interpretation* § 245, at 318 (2d ed. 1936) (summarizing and collecting cases). Those courts understood that as a result of the "degree of flexibility in [money's] popular meaning," the term's proper construction in a particular will depends on the context in which the term appears. *Mt. Holly Safe Deposit & Trust Co.* v. *Deacon*, 81 A. 356, 357 (N.J. Ch. 1911); see *McCullen* v. *Daughtrey*, 129 S.E. 611, 613 (N.C. 1925); *Paul* v. *Bell*, 31 Tex. 10, 10 (1868); see also E. S. Oakes, Annotation, *What included in term 'money' in will*, 93 A.L.R. 514 (1934) (compiling decisions treating "money" as "a term of flexible meaning, having either a restricted or wide signification"). In a 1921 decision construing a court rule, the Seventh Circuit similarly explained that "'[m]oney' is a broader and more generic term" than "cash," and that it "may include not only legal tender, coin, or currency, but also any other * * * instruments or tokens in general use in the commercial world as representatives of value"—a category that the court determined included U.S. bonds. *McGovern* v. *United States*, 272 F. 262, 263.

Courts in the years before the RRTA's enactment thus recognized that the term "money" often encompassed stocks and similar instruments, even though stock was then less liquid and less widely used as compensation than it is today. See, *e.g.*, *Mutual Life Ins. Co.* v. *Spohn*, 188 S.W. 1078, 1078 (Ky. 1916) (stating that "'money' is often used in wills in a broad and elastic sense" to encompass "ground rents, bonds and notes," among other interests); *Smith* v. *Burch*, 92 N.Y. 228, 231-232 (1882) ("[T]he word 'money' has sometimes

been held to include securities [and] stocks."); *Perkins* v. *Mathes*, 49 N.H. 107, 111 (1869) ("[B]onds, bank stock, deposit notes and promissory notes have often been held to pass under the term 'moneys' in a will."); *Fulkerson* v. *Chitty*, 57 N.C. (4 Jones Eq.) 244, 245 (1858) (per curiam) (stating that it "cannot admit of any doubt" that "money" may "include stock in a bank, or in the public funds," and further concluding that "notes and bonds may be included in that term"). Accordingly, a number of decisions construed conveyances of "money" to convey stocks and similar instruments. See, *e.g.*, *Industrial Trust Co.* v. *Saunders*, 42 A.2d 492, 494-495 (R.I. 1945) (stock); *Lane* v. *Railey*, 133 S.W.2d 74, 79 (1939) (stocks and bonds); *Gandy* v. *Stanton*, 157 A. 894, 896 (N.J. Ch. 1931) (stock in building and loan associations); *Baldwin* v. *Baldwin*, 151 A. 741, 742 (N.J. Ch. 1930) (stock in a building and loan association and utility company); *Hinkley* v. *Primm*, 41 Ill. App. 579, 581-582 (Ill. App. Ct. 1892) (securities consisting of bonds and promissory notes); *Jenkins* v. *Fowler*, 63 N.H. 244, 246 (1884) (railroad stock).

Even decisions that petitioners invoke (Br. 22, 24), which adopted narrower readings of the term "money" in particular contexts, recognized that the term *could* extend to liquid assets such as publicly traded stocks. Petitioners cite (Br. 24) *In re Boyle's Estate*, 37 P.2d 841, 842 (Cal. Dist. Ct. App. 1934), for its statement that the "ordinary" meaning of "money" does not reach stocks. The court in that case further observed, however, "that the word 'money' has been given a broader significance under certain circumstances." *Ibid.* In concluding that stock fell outside the conveyance of "money" in the will at hand, the court explained that the

will as a whole established the decedent's intent to include corporate stocks in the portion of the will addressing "all my personal property." *Ibid.* The court in *In re Hokulani Square*, 776 F.3d 1083 (9th Cir. 2015), on which petitioners also rely (Br. 22), similarly recognized that "[t]here are numerous ways to define 'moneys.'" 776 F.3d at 1085. It concluded that real estate was not "money" based on such property's "highly illiquid" nature, *id.* at 1086—an attribute that publicly traded stocks do not possess.

The two decisions of this Court on which petitioners rely (Br. 24-25) are also consistent with the understanding that the term "money" sometimes encompasses stock. See *ibid.* (discussing *Helvering* v. *Credit Alliance Corp.*, 316 U.S. 107 (1942), and *Commissioner* v. *LoBue*, 351 U.S. 243 (1956)). In neither case did the Court interpret a statute or instrument that used the term "money." See *Credit Alliance Corp.*, 316 U.S. at 109, 112 (concluding that dividends paid to a parent company qualified for tax credits under a provision of the tax code governing "amounts distributed in liquidation") (citation omitted); *LoBue*, 351 U.S. at 247 (concluding that stock distributions were taxable income under a definition reaching "income derived from compensation in 'whatever form paid'"). In the course of its analysis, however, the Court in each case referred to "stocks" on the one hand and "money" on the other. See *Credit Alliance Corp.*, 316 U.S. at 112 (describing a statutory provision that governed the tax treatment of stocks as "irrelevant to this controversy, because the distribution here was in property and money, not in stock or securities"); *LoBue*, 351 U.S. at 247 ("It makes no difference that the compensation is paid in stock rather than in money.").

Those statements are consistent with the understanding that "money" has both broader and narrower meanings. When "stock" is used in contradistinction to "money," context establishes that "money" is used in its narrower sense. As explained above, however, courts at the time of the RRTA's enactment often construed "money" to encompass stocks and other non-currency property when context supported that reading.

c. Congress has enacted statutory definitions that also reflect that "money" can encompass stock. Section 731(c)(1)(A) of Title 26 of the U.S. Code states that, for purposes of certain tax-law provisions, "the term 'money' includes marketable securities." The federal money-laundering statute forbids certain transactions in "monetary instruments" and defines "monetary instruments" to include "investment securities." 18 U.S.C. 1956(c)(5)(ii). While petitioners point to other provisions (Br. 31-32) that use the term "stock" in contradistinction to "money," those provisions are again consistent with the proposition that "money" has both broader and narrower uses.[5]

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[5] Amicus Norfolk Southern Corporation suggests (Br. 13-16) that a narrow definition of "any form of money remuneration" is supported by a regulation that defines "cash remuneration" in a portion of FICA concerning domestic and agricultural employees, 26 U.S.C. 3121(a)(7) and (8), as limited to cash, checks, and monetary media of exchange, see 26 C.F.R. 31.3121(a)(8)-1(f). That regulation interprets a statutory provision that is materially different from the one at issue here because it concerns "cash remuneration," which is statutorily defined to exclude "remuneration paid in any medium other than cash." 26 U.S.C. 3121(a)(7) and (8). In addition, that statutory provision is part of a framework governing agricultural and domestic employees that is different in many respects from the RRTA's framework governing railway workers.

2. The exclusions contained in the RRTA's definition of "compensation" reinforce the conclusion that "any form of money remuneration" includes publicly traded stock

a. It is a "cardinal rule" of statutory interpretation "that statutory language must be read in context, since a phrase gathers meaning from the words around it." *Hibbs* v. *Winn*, 542 U.S. 88, 101 (2004) (brackets and citation omitted); see, *e.g.*, *Leocal* v. *Ashcroft*, 543 U.S. 1, 9 (2004). "The rule against superfluities complements [th]is principle" by directing that "'[a] statute should be construed so that effect is given to all its provisions,'" and "'no part will be inoperative or superfluous, void or insignificant.'" *Hibbs*, 542 U.S. at 102 (quoting 2A Norman J. Singer, *Statutes and Statutory Construction* § 46.06, at 181, 186 (6th rev. ed. 2000)).

Those principles counsel that definitions should be construed in a manner that gives their exceptions substantive effect. Accordingly, in determining that the FICA term "wages" encompasses severance payments, this Court relied in part on a later-enacted exception that covered certain types of termination-related pay. *United States* v. *Quality Stores, Inc.*, 134 S. Ct. 1395 (2014). The Court explained that the "specific exemption under FICA for certain termination-related payments" was evidence that severance payments "are well within the definition of wages" because the exception "would be unnecessary were severance payments in general not within FICA's definition of 'wages.'" *Id.* at 1400. Similarly, in *American Bank & Trust Co.* v. *Dallas County*, 463 U.S. 855, 864 (1983), this Court declined to read a statute in a manner that would cause "specific exceptions" to be "superfluous."

The express statutory carve-outs from the RRTA's definition of "compensation" reinforce the inference that "any form of money remuneration" includes publicly traded stock. Especially relevant is the carve-out for qualified stock options.[6] The RRTA specifies that "[t]he term 'compensation' shall not include any remuneration on account of * * * a transfer of a share of stock to any individual pursuant to an exercise of an incentive stock option * * * or under an employee stock purchase plan." 26 U.S.C. 3231(e)(12)(A). That exception "would be unnecessary," *Quality Stores*, 134 S. Ct. at 1400, if compensation in stock was not "money remuneration" to begin with. The exception for qualified stock options thus indicates "that *non-qualified* stock options"—the type at issue in this case—"are covered by the term 'money remuneration' and are therefore taxable." Pet. App. 4a-5a.

Other carve-outs from "compensation" include employee achievement awards in the form of tangible personal property, 26 U.S.C. 3231(e)(5); certain "meals or lodging furnished by or on behalf of the employer," 26 U.S.C. 3231(e)(9); and payments made by an employer for health and disability insurance, 26 U.S.C. 3231(e)(1)(i). Those exceptions would also be superfluous in whole or in part if the RRTA's basic definition of

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[6] Qualified stock options, or incentive stock options, are a class of options that often receive favorable treatment under the Internal Revenue Code, but are subject to stringent limitations. For instance, the Internal Revenue Code caps the amount of compensation that individuals may receive through qualified stock options in a calendar year, imposes certain holding requirements on the shares, and requires shareholder approval to issue such options. See 26 U.S.C. 422.

"compensation" excluded all non-cash remuneration. See Pet. App. 5a; see also *BNSF*, 775 F.3d at 754.

b. Petitioners' efforts to reconcile the various statutory carve-outs with their narrow understanding of "money remuneration" are unavailing.

i. Petitioners suggest (Br. 34) that the carve-outs from "compensation" should be disregarded because "[t]he meaning of the term 'money remuneration' was fixed in 1937 and subsequent amendments cannot change that meaning absent an express or implied repeal." They argue, in particular, that the amendments adding exceptions to the RRTA's definition of "compensation" are irrelevant in construing that term because the later enactments do not meet the standard for implied repeal of an earlier provision. See Pets. Br. 34-35.

Contrary to petitioners' argument, later-enacted statutory language can clarify the meaning of pre-existing provisions even if the later enactment does not impliedly repeal the earlier one. The "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute." *United States* v. *Fausto*, 484 U.S. 439, 453 (1988). Thus, "[w]here a statutory term presented to [this Court] for the first time is ambiguous," the Court adopts the "permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law." *West Va. Univ. Hosps.* v. *Casey*, 499 U.S. 83, 100-101 (1991). Reconciling statutes in this way is not tantamount to an implied repeal. See *United States* v. *Estate of Romani*, 523 U.S. 517, 530 (1998) ("Given the fact that this basic question of interpretation [of a 1797 statute] remains unresolved, it does not seem appropriate to

view the issue in this case as whether the Tax Lien Act of 1966 implicitly amended or repealed the priority statute. Instead, we think the proper inquiry is how best to harmonize the impact of the two statutes.").

ii. Petitioners also argue that the RRTA exceptions would retain some minimal practical effect even under their narrow construction of the term "money remuneration." Petitioners' approach fails to make sense of the qualified-stock-option exception and would render multiple in-kind benefit exceptions either wholly or partially superfluous.

A. Petitioners observe (Br. 37) that employees sometimes receive cash payments from their employers at the same time the employees exercise stock options. But the RRTA's exception for remuneration "on account of * * * the transfer of a share of stock pursuant to an exercise of an incentive stock option," 26 U.S.C. 3231(e)(12), is not naturally read to exempt from RRTA tax every cash payment that an employee receives contemporaneously with the exercise of a stock option. The regulation that petitioners cite (Br. 37) simply provides that "[a]n option does not fail to be an incentive option merely because the optionee has the right to receive additional compensation, in cash or in property, when the option is exercised." 26 C.F.R. 1.422-5(c). The regulation thus ensures that qualified stock options do not lose their special tax status by virtue of accompanying payments, but it does not exempt the cash payments themselves from RRTA taxation.

Petitioners more modestly hypothesize (Br. 37) that the qualified-stock-option exception could have been intended to exempt a particular, narrow class of cash payments: payments made "in lieu of a fractional share" of stock when an option is exercised. When a business that

issued an option is acquired by another company or undertakes a "reverse stock split," see *Black's Law Dictionary* 1585, 1645 (10th ed. 2014), employees holding already issued options can sometimes wind up with an option for a fractional share of stock. In lieu of the fractional interest, an employer may simply pay the employee the value of the fractional share in cash.

Petitioners' fractional-share account is not a plausible account of this statutory exception, however. Under the applicable interpretive canon, courts seek to avoid constructions that render statutory exceptions "largely superfluous"—not simply those that render them total nullities. *Arkansas Best Corp.* v. *Commissioner*, 485 U.S. 212, 218 (1988) (rejecting reading of a tax statute that would be "in tension with [enumerated] exceptions" because the taxpayer's reading would render the exclusions "largely superfluous"); *American Bank & Trust Co.*, 463 U.S. at 864. "When Congress acts to amend a statute," this Court "presume[s] it intends its amendments to have real and substantial effect." *Quality Stores*, 134 S. Ct. at 1401 (quoting *Stone* v. *INS*, 514 U.S. 386, 397 (1995)). Reading the broadly worded language of 26 U.S.C. 3231(e)(12) to reach only small cash payments in lieu of fractional shares is not consistent with that principle.

Other evidence further belies petitioners' suggestion that the qualified-stock-option carve-out was designed to reach accompanying cash payments. When Congress enacted the RRTA exception for qualified stock options, it added an identically worded exception to the definition of taxable "wages" under the FICA. The undisputed purpose and effect of that FICA exception was to exempt the income realized from the options themselves —income that would otherwise fall within the FICA's

definition of taxable "wages." There is no reason to suppose that the identically worded RRTA provision had a fundamentally different purpose.

The bill creating parallel exclusions for qualified stock options in the FICA and the RRTA was understood as creating "a conforming exclusion for employment taxes" to the treatment of qualified stock options under the income tax code, which already had "a specific income tax exclusion with respect to [qualified] stock options." H.R. Rep. No. 548, 109th Cong., 2d Sess. Pt. 1, at 145 (2004); see Staff of the Joint Comm. on Taxation, 109th Cong., 1st Sess., *General Explanation of Tax Legislation Enacted in the 108th Congress* 218-219 (Joint Comm. Print 2005) (*General Explanation*) (qualified-stock-option exception was designed to replicate the favorable tax treatment of qualified stock options under the income-tax laws). The Joint Committee print explained that the FICA exception clarified that such options would not be taxed under the FICA, *General Explanation* 219, and that the RRTA exception "provide[d] a similar exclusion under the Railroad Retirement Tax Act," *id.* at 219 n.378. The only understanding that accords with the statutory text, the rule against superfluities, history, and common sense is that the carveout for qualified stock options was enacted to exclude from taxable "compensation" a particular type of stock option that would otherwise be taxable.

B. Numerous other exclusions from the RRTA's definition of "compensation" likewise reflect the premise that non-cash remuneration easily convertible into currency can be a "form of money remuneration."

For example, "item[s] of tangible personal property" that are given as awards for employee achievement are exempt from RRTA taxation. 26 U.S.C. 274(j)(3)(A);

see 26 U.S.C. 3231(e)(5) ("The term 'compensation' shall not include any benefit provided to or on behalf of an employee if at the time such benefit is provided it is reasonable to believe that the employee will be able to exclude such benefit from income under section 74(c)"); see also 26 U.S.C. 74(c) ("Gross income shall not include the value of an employee achievement award (as defined in section 274(j))."). On petitioners' reading of the statute, this exception would be unnecessary, because petitioners' narrow definition of "money remuneration" would not reach awards of tangible personal property.

Amici CSX Corporation et al. suggest (Br. 9) that this exception would retain meaning under petitioners' view because it would exempt the subset of "gift certificates" that are "akin to credit cards and usable at a variety of retailers." But a certificate of that type is not readily described as an item of "tangible personal property" at all, and the Department of Treasury has for decades foreclosed such a reading. See 26 C.F.R. 1.274-3(b) (1990) (providing that "'tangible personal property' does not include cash or any gift certificate other than a nonnegotiable gift certificate conferring only the right to receive personal property"). Congress recently codified that interpretation. 26 U.S.C. 274(j)(3)(A)(ii) (specifying that "'tangible personal property' shall not include "cash, cash equivalents, gift cards, gift coupons, or gift certificates (other than arrangements conferring only the right to select and receive tangible personal property from a limited array of such items pre-selected or pre-approved by the employer)").

In any event, it is not plausible that Congress added a broad exclusion for awards of "tangible personal property" to the RRTA in order to capture only awards in-

volving a narrow subspecies of gift certificates. See *Arkansas Best Corp.*, 485 U.S. at 218 (exceptions should not be construed in a manner that would render them "largely superfluous"); *Quality Stores*, 134 S. Ct. at 1401. Moreover, CSX offers no reason why Congress would make employee achievement awards taxable under the RRTA when paid in currency, but enact an exception for such awards in one particular currency equivalent: gift certificates that are "akin to credit cards and usable at a variety of retailers." CSX Amicus Br. 9.

Petitioners' narrow interpretation of "money remuneration" would likewise create superfluity in the RRTA exclusion for employer-provided meals and lodging. That exclusion states that "[t]he term 'compensation' shall not include the value of meals or lodging furnished by or on behalf of the employer," so long as "it is reasonable to believe that the employee will be able to exclude such items from income under section 119," which sets out categories of excludable meals and lodging. 26 U.S.C. 3231(e)(9); see 26 U.S.C. 119. Like employee achievement awards of tangible personal property, the meals and lodging that Section 3231(e)(9) exempts would not constitute "money remuneration" under petitioners' interpretation of that term.

To identify some circumstance in which the exception would do work under their interpretation, petitioners point (Br. 38-39) to a single subsection of Section 119, the meal-and-lodging provision that is cross-referenced in the RRTA exclusion. That subsection allows an employee to exclude from taxable income under specified circumstances fees that the employee must pay the employer "on a periodic basis" as "a fixed charge for his meals." 26 U.S.C. 119(b)(3)(A). But it would be strange for Congress to enact a broadly worded exception for

"the value of meals * * * furnished by or on behalf of the employer," and to cross-reference the entirety of Section 119, 26 U.S.C. 3231(e)(9), if it intended only to provide an exclusion for employees required to pay fees for their meals as provided in Section 119(b)(3)(A). And even if this were a plausible reading of the portion of the RRTA exclusion that governs *meals*, it would deprive the RRTA exclusion for employer-furnished *lodging* of any practical significance.

The exclusion for employer-provided health and disability insurance, 26 U.S.C. 3231(e)(1)(i), would likewise be partially superfluous under petitioners' reading of "money remuneration." Petitioners observe (Br. 38) that *parts* of Section 3231(e)(1)(i) would have meaning on their view because the exclusion encompasses circumstances in which the employer reimburses the employee for obtaining insurance. See *ibid.* (explaining that the exclusion covers some "cash payments made to an employee"). Under petitioners' approach, however, other language in that provision would be devoid of any practical effect, since Section 3231(e)(1)(i) expressly encompasses circumstances in which the employer simply pays for the employee's health insurance. See 26 U.S.C. 3231(e)(1)(i) (exclusion for "the amount of any payment * * * made to, *or on behalf of*, an employee * * * under a plan or system established by an employer * * * on account of sickness or accident disability") (emphasis added).

B. Historical Practice Supports The Court Of Appeals' Conclusion That An Employer's Provision Of Stock To Its Employees Falls Within The RRTA's Definition Of Taxable "Compensation"

Before it enacted the RRTA, Congress used the term "money remuneration" in ways that reached well beyond currency. The responsible federal agencies' contemporaneous interpretations of that term also extended beyond currency to stock and other in-kind benefits. And by repeatedly amending the RRTA's definition of "compensation" to exclude particular in-kind benefits, while leaving the general definition unchanged, Congress acquiesced in the construction of "money remuneration" that the agencies have applied for more than half a century.

1. Congress's use of the term "money remuneration" before the enactment of the RRTA demonstrates an understanding that the term reaches non-cash benefits

Congress first defined "compensation" as "any form of money remuneration" in 1935 railroad-retirement legislation that was ultimately struck down as exceeding Congress's powers under the Commerce Clause and other constitutional provisions. Carriers and Employees Tax Act (CETA), ch. 813, § 1(d), 49 Stat. 974; see *Railroad Ret. Bd.* v. *Alton R.R.*, 295 U.S. 330 (1935). That legislation consisted of taxation and benefits statutes paralleling the RRTA and RRA.

Early versions of the 1935 railroad-benefits statute reflected an understanding that the term "any form of money remuneration" could encompass non-cash compensation. Those bills defined "compensation" as "any form of money remuneration for active service received by an employee from a carrier, *including salaries, commissions, and the reasonable value of board, rents,*

lodging, and other similar advantages furnished for subsistence to an employee while in service," while excluding "the value of such boards, rents, housing, lodging, and other similar advantages combined which is less than $10 for any calendar month," and further excluding "free transportation." S. 2862, 74th Cong., 1st Sess., § 1(e), at 3 (1935) (defining "compensation") (emphasis added); see H.R. 8121, 74th Cong., 1st Sess. § 1(e), at 3 (1935) (identical definition used to define "pay"). While the railroad-benefits statute that Congress ultimately enacted in 1935 contained a simpler definition of "compensation," which omitted illustrative examples of money remuneration and the carve-out for certain smaller-value benefits, the proposed bills demonstrate an understanding that "any form of money remuneration" naturally includes readily-valued in-kind compensation.[7]

The express exclusion of free-transportation benefits in the enacted 1935 railroad benefits and taxation statutes reinforces the breadth of "any form of money remuneration." At the time of the RRTA's enactment, railroad workers typically received "free transportation during all of their lives." *H.R. 8652 Hearings* 6. The RRTA and RRA predecessors that Congress enacted in 1935 expressly exempted those benefits from taxation by providing that "compensation" "shall not include free transportation." CETA § 1(d), 49 Stat. 974; see Railroad Retirement Act of 1935, ch. 812, § 1(g), 49 Stat. 968.

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[7] These 1935 proposals appear to have been abandoned because of their reliance on the Commerce Clause, in the wake of this Court's decision invalidating an early version of the RRTA on the ground that it exceeded Congress's Commerce Clause authority. See *Douglas Report* 64 (describing withdrawal of these draft bills).

Those exclusions reflect, at minimum, the understanding that "any form of money remuneration" could reasonably be read to reach those benefits, absent an exclusion.[8]

2. ***Agency interpretations that have been ratified by Congress reflect the understanding that RRTA "compensation" includes stock***

a. i. In 1937, the Department of Treasury issued a regulation that defined the RRTA term "compensation" to reach both "all remuneration in money" and remuneration in "something which may be used in lieu of money (scrip and merchandise orders, for example)." 26 C.F.R. 410.5 (1938); Treas. Reg. 100, Art. 5 (1937) (same). That regulation remained in effect, essentially unchanged, for more than 50 years. See 59 Fed. Reg. at 66,188 (first major revision to the regulation). The primary definition of "scrip" at the time of the RRTA's enactment referred to "[c]ertificates of ownership, either absolute or conditional, of shares in a public company, corporate profits, etc." *Black's Law Dictionary* 1588 (3d ed. 1933); see C. Martin Alsager, *Dictionary of Business Terms* 321 (1932) ("A certificate which represents fractions of shares of stock.") (primary definition);

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[8] One report suggests that the drafters of the 1937 RRA concluded that an express exclusion was not needed to place railroad workers' transportation benefits outside the RRA. See S. Rep. No. 697, 75th Cong., 1st Sess. 8 (1937) (describing the 1937 RRA as "omitt[ing] part of the [1935 RRA's] definition of 'compensation' as superfluous"). That view is consistent with the understanding that "money remuneration" encompasses many in-kind benefits—as reflected in agency interpretations and subsequent congressional enactments—because the lifetime, non-transferrable travel privileges that railroad workers received did not have a readily ascertainable cash value. See 20 C.F.R. 222.2 (1938); see also pp. 38-40, *infra*.

3 F. Stroud, *The Judicial Dictionary* 1802 (2d ed. 1903) ("a [c]ertificate, transferable by delivery, entitling its holder to become a Shareholder or Bondholder in respect of the shares or bonds therein mentioned") (emphasis omitted) (primary definition); see, *e.g.*, *Eisner* v. *Macomber*, 252 U.S. 189, 227 (1920) (Brandeis, J., dissenting) (referring to "scrip" as company stock).

Petitioners assert that the term "scrip" in that regulation is best understood as a reference to "'private currency issued by corporations . . . to meet payrolls and which was redeemable in the company store.'" Pets. Br. 27 n.4 (citation omitted). But the definition petitioners propose did not appear at all in the 1933 edition of *Black's Law Dictionary*, which defined "scrip" as a certificate for stock in its primary definition, not in a "subordinate" one, *ibid.* Petitioners' definition also does not appear in the other RRTA-era dictionaries cited above. And even if the term "scrip" in the 1937 regulation encompassed the type of "private currency" to which petitioners refer, there is no reason to construe it as *excluding* publicly traded stocks that can be readily converted to cash.

ii. The year after the RRTA and RRA were enacted, the Board issued regulations that construed the definition of "compensation" in the RRA. Because the RRA's definition of "compensation," 45 U.S.C. 231(h)(1), is identical to the RRTA's in pertinent part, see 26 U.S.C. 3231(e)(1), and because RRTA taxes are used to fund RRA benefits, courts have long held that the statutes' definitions "should be identically construed and applied," *Universal Carloading & Distrib. Co.* v. *Pedrick*, 184 F.2d 64, 66 (2d Cir.), cert. denied, 340 U.S. 905 (1950); see, *e.g.*, *Atlantic Land & Improvement Co.* v. *United States*, 790 F.2d 853, 855 (11th Cir. 1986).

The Board's 1938 regulations treated the term "any form of money remuneration" as reaching in-kind compensation that could be assigned a definite cash value. In particular, those regulations, which remain in effect today, provided that "amounts to be paid in the form of a commodity, service, or privilege" qualified as "compensation" so long as the employer and employee had agreed in advance that part of the employee's compensation would be paid "in the form of such commodity, service, or privilege," and had also agreed "upon the value of such commodity, service, or privilege." 20 C.F.R. 222.2 (1938); see 20 C.F.R. 211.2(a) (current).

The Board's informal guidance confirmed that the agency understood "money remuneration" to include non-cash compensation with a determinate value. That guidance explained that "compensation" includes "any money equivalent" that was part of an employee's agreed wages and had "an agreed definite value." Staff of the R.R. Ret. Bd., *Selected Questions & Answers on Railroad Retirement Act* 20, 22 (R.R. Ret. Bd. 1937). Among the items that could constitute "compensation," the guidance identified "[r]ent of section houses, or of depot living rooms, or fuel, electric current, water, or food," so long as those benefits were "received as part of [an] agreed wage at an agreed definite value." *Id.* at 22. An instruction manual for employers similarly explained that "compensation" includes those items "which may be used in lieu of money," which could include "[s]crip, merchandise orders, the use of a house or any other valuable equivalent" whose value was agreed

upon. Railroad Retirement Board, *Instructions to Employers and Manual of Operations for Collection of Prior Service Records*, App. to Art. 2, at I (1940).[9]

Consistent with the relatively broad understanding of "money remuneration" reflected in its regulations, the Board has determined in legal opinions that stock can qualify as "money remuneration." The year after the RRTA and RRA were enacted, the Board issued an opinion stating that "stock [that] was received by * * * employees as a part of their agreed compensation," as distinct from payments to induce an employee's initial entry into an employment agreement, constituted

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[9] Early Board and IRS opinions predating the enactment of specific Internal Revenue Code provisions governing employer-provided fringe benefits (see 26 U.S.C 3231(e)(5); 26 U.S.C 3231(e)(9)) accordingly determined that particular in-kind benefits were "money remuneration" when they were conferred pursuant to an employment agreement and the employer and employee had agreed as to the benefit's value. For example, a 1944 opinion determined that employer-sponsored life insurance was "money remuneration." Board G.C.M. L-44-272 (May 4, 1944). And numerous opinions classified lodging as "compensation" when it was furnished pursuant to an employment agreement. Board G.C.M. L-45-174 (Mar. 27, 1945) (housing benefit for rail foreman); Board G.C.M. L-43-891 (Dec. 31, 1943) (same); Board G.C.M. L-41-576 (Nov. 10, 1941) (same); compare Board G.C.M. L-39-69, at 3 (Feb. 9, 1939) (housing for certain employees was not "money remuneration" because the parties had not agreed on a "definite value in terms of dollars and cents" for the benefit and the Board would not "undertake to assign any value thereto"); Board G.C.M. L-39-727, at 1 (Nov. 13, 1939) (room and board were not "compensation" when they were provided "as a matter of company convenience, not as partial compensation"); see Rev. Rul. 391, 1969-2 C.B. 191 (housing accommodations furnished to employee are compensation "[i]f an employer and employee have agreed that housing accommodations of an appropriate fixed value are a part of the employee's total remuneration").

"money remuneration" for services rendered under the RRTA. Board G.C.M. L-38-440, at 2. A more recent opinion likewise concluded that NQSOs provide "money remuneration." Board G.C.M. L-2005-25, at 5-7.[10]

b. These contemporaneous interpretations of the relevant statutory definition deserve significant weight. The manner in which the responsible federal agencies construed and applied the RRTA and RRA immediately after enactment are evidence of the original public meaning of the statutory language. See, *e.g.*, *Edwards' Lessee* v. *Darby*, 25 U.S. (12 Wheat.) 206, 210 (1827) ("In the construction of a doubtful and ambiguous law, the cotemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect."); see also *Norwegian Nitrogen Prods. Co.* v. *United States*, 288 U.S. 294, 315 (1933).

In the ensuing years, moreover, Congress has enacted numerous amendments to the statutes without altering or calling into question the agencies' determination that non-cash benefits like stock can constitute a "form of money remuneration." "[W]hen Congress revisits a statute giving rise to a longstanding administra-

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[10] A 1997 Board opinion concluded that a stock award for "perfect attendance and superior performance" that was solely in the employer's discretion and not part of the employment agreement was not "money remuneration" under the RRA while distinguishing cases in which "it [was] agreed upon in advance that the performance of certain services, *e.g.*, perfect attendance, would result in an award" of stock. Board G.C.M. L-97-16, at 1-2 & n.1 (Apr. 16, 1997). That opinion's special treatment for awards outside the terms of the employment agreement is not consistent with the Board's 2005 legal opinion regarding NQSOs. See Board G.C.M. L-2005-25, at 5-7.

tive interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *CFTC* v. *Schor*, 478 U.S. 833, 846 (1986) (citation and internal quotation marks omitted); see *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 159 (2013) (same point); *Cottage Sav. Ass'n* v. *Commissioner*, 499 U.S. 554, 561 (1991) ("Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law.") (citations omitted). The inference that Congress has approved the agencies' interpretation of the term "money remuneration" is particularly strong because Congress has added numerous exclusions to the definition of "compensation" that would make little sense under petitioners' contrary reading of that term. See *Texas Dep't of Hous. & Community Affairs* v. *Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2520 (2015) (finding inference of congressional ratification to be particularly strong when statutory amendments "presupposed" a point embodied in the earlier interpretations).

C. Treating An Employer's Provision Of Publicly Traded Stock As Taxable "Compensation" Furthers The RRTA's Objectives

1. The RRTA and RRA were enacted to replace inadequately funded private pension plans with a financially stable and self-sustaining system of pension benefits for railroad workers. Whitman 41; Joint Committee Print 15-17. As this Court has explained in the context of social security, the interest in providing a financially stable, self-sustaining pension system counsels against "constricted interpretation of the phrasing" of

the taxing statute. *United States* v. *Silk*, 331 U.S. 704, 712 (1947). An unduly narrow interpretation "would only make for a continuance, to a considerable degree, of the difficulties for which the remedy was devised and would invite adroit schemes by some employers and employees to avoid the immediate burdens at the expense of the benefits sought by the legislation." *Ibid.*

Construing "any form of money remuneration" to exclude highly liquid cash substitutes would enable employers to "avoid the immediate burdens" of RRTA taxation, at the expense of adequately funding the benefits that the RRA guarantees. *Silk*, 331 U.S. at 712; see *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572, 575 (1979) (noting that Tier 1 of RRA "benefits corresponds exactly to those an employee would expect to receive were he covered by the Social Security Act."). Publicly traded stock, like a savings bond or a Bitcoin, is a highly liquid asset that functions as a near-cash-equivalent and could easily be substituted for cash compensation without significantly inconveniencing employees. The recipient can simply direct his broker to exercise the option and sell the stock, depositing the proceeds in his bank account—as more than 90% of employees exercising options at several railroads do. See *BNSF*, 775 F.3d at 747; *CSX Corp.*, 2017 WL 2800181, at *2.

Petitioners' approach would create a particularly serious threat to the design of the RRTA system because stock-based compensation is a rapidly increasing share of employee compensation for high-level employees. See pp. 6-7, *supra*. Exempting from RRTA taxation a growing share of employee compensation, and providing a roadmap for exempting a still greater share of employee compensation in the future, would undermine

the RRTA's core objective of providing a stable and well-funded pension system.

2. Petitioners suggest (Br. 3-4, 41, 46-47) that their interpretation is consistent with a purported congressional goal of "[m]odeling the new railroad retirement system on the existing pension structure" that was used in pre-RRTA private railroad pension plans. Pets. Br. 41. But Congress established the RRTA in response to the "myriad problems facing the railroad industry's private pension plans," which were "generally inadequate, liable to capricious termination, and of little assistance to disabled employees." Whitman 41. In suggesting that Congress sought to replicate the design of the preexisting private pension system, petitioners appear to rely on the fact that Congress estimated RRTA tax revenues using a percentage of the railroad employers' "'pay roll,' as memorialized in the railroads' annual reports to the Interstate Commerce Commission." Pets. Br. 26. It is unsurprising, however, that Congress made estimates using the pay statistic that had already been published in government reports. Congress's use of that statistic as a starting point does not suggest an intent to replicate, in the new federal program, the substance of pre-RRTA private railroad pension schemes. And petitioners themselves concede (Br. 24) that the RRTA by its terms reaches beyond the regular salaries that constituted employers' payrolls, and also includes "commissions, bonuses" and any other remuneration in currency.

Petitioners' related suggestion that "[a] narrower tax base makes perfect sense because the RRTA imposes higher tax *rates* than does FICA," Br. 45, reflects a misunderstanding of the RRTA's design. The RRTA's Tier 1 tax rates are identical to the FICA's, and they

fund benefits identical to those paid under social security. See 26 U.S.C. 3201(a); *Hisquierdo*, 439 U.S. at 575. Congress could not have expected to fund the same benefit levels as social security by applying the identical tax rate to a materially smaller category of compensation. The RRTA also imposes an additional Tier 2 tax which funds different, pension-style benefits. See *Hisquierdo*, 439 U.S. at 575. But the existence of a Tier 2 tax that has no social security analogue should not obscure the fundamental correspondence between the Tier 1 and FICA taxes.

D. Deference Principles Support Treating Stock As Taxable "Compensation" Under The RRTA

As the court below correctly held, the RRTA's definition of taxable "compensation," read in light of the statute's history and design, is most naturally understood to encompass shares of publicly traded stock. Regulations promulgated by the agency that administers the statute reinforce that conclusion.

1. Current Department of Treasury regulations state that "[t]he term compensation" under the RRTA "has the same meaning as the term wages" in the FICA, "except as specifically limited by the [RRTA]" or by regulation. 26 C.F.R. 31.3231(e)-(1)(a) (emphasis omitted). In adopting that regulation in 1994, the agency emphasized that decades of amendments to the FICA and the RRTA had brought the statutes closer together, including by "conforming the structure of the RRTA to parallel that of the FICA." 59 Fed. Reg. at 66,188. The Department of Treasury observed that Congress had also enacted parallel exemptions covering common "nonmonetary benefits such as fringe benefits, meals and lodging," and life-insurance premiums, so that "the exclusions from the definition of compensation under the

RRTA, with few exceptions, mirror the exclusions from the definition of wages under the FICA." *Ibid.* The agency also noted that, in making other changes to the RRTA, "Congress often indicated the purpose was to provide conformity to FICA." *Ibid.* Taking account of that history and the statutes' now-parallel structures, the Department of Treasury determined that the statutes' categories of taxable income should be construed as parallel except when the RRTA's definition is "specifically limited." 26 C.F.R. 31.3231(e)-(1)(a). That regulation supports the conclusion that NQSOs are taxable under the RRTA because such options are taxable under the FICA and the RRTA contains no specific limitation governing NQSOs.

In addition, the Board's regulation defining "compensation" under the RRA reinforces the conclusion that publicly traded stock is taxable "compensation" under the RRTA. The RRA and the RRTA contain identical definitions of "compensation." See 26 U.S.C. 3231(e); 45 U.S.C. 231(h)(1). And since 1938, the Board has interpreted the RRA term "any form of money remuneration" in a manner that is flatly inconsistent with petitioners' view that "compensation" reaches only those mediums of exchange that can be used to buy groceries or pay rent. Instead, the Board has concluded that "money remuneration" can include payments in the form of a "commodity, a service or a privilege." 20 C.F.R. 211.2; see pp. 38-41, *supra*.

2. Petitioners' contrary arguments lack merit.

a. Petitioners contend (Br. 47-48) that the Department of Treasury regulation by its own terms does not treat stock acquired through the exercise of NQSOs as taxable "compensation" under the RRTA. The regulation states that the RRTA term "compensation" and the

FICA term "wages" should be treated as congruent "except as specifically limited by the [RRTA]" or by regulation. 26 C.F.R. 31.3231(e)-(1)(a) (emphasis omitted). Petitioners argue (Br. 47) that, through its inclusion of the word "money" in its basic definition of "compensation," "the RRTA *does* 'specifically limit' what would otherwise be taxable under FICA." Petitioners contend on that basis (Br. 47-48) that, if publicly traded stock would otherwise fall outside the RRTA term "money remuneration," it is not encompassed by the regulatory definition either.

That is not a plausible reading of the regulation. The basic purpose of the Department of Treasury rule was to align the general RRTA and FICA definitions. See 59 Fed. Reg. at 66,188 (stating that, because "Tier 1 of the RRTA mirrors the Federal Insurance Contributions Act (FICA), these regulations generally cross-reference the definition of compensation under the RRTA to the definition of wages under the FICA"). Under petitioners' theory, however, the RRTA term "compensation" and the FICA term "wages" would differ substantially in their coverage because one definition contains the word "money" and the other does not. The Department of Treasury's regulation cannot plausibly be thought to incorporate that approach. *BNSF*, 775 F.3d at 757. Rather, the reference to instances in which the definition of "compensation" is "specifically limited by the [RRTA]," 26 C.F.R. 31.3231(e)-1(a), is best understood as a reference to the specific RRTA exclusions that differ from those under the FICA.

b. Petitioners argue (Br. 48) that the Department of Treasury could not lawfully classify the provision of stock through NQSOs as taxable "compensation" under

the RRTA because the statutory definition is "unambiguous" in excluding non-currency compensation. As explained above, however, the RRTA's basic definition of "compensation," read in light of the accompanying exclusions for particular types of stock options and various in-kind benefits, is most naturally understood to encompass stock. At the very least, the statutory definition does not foreclose the Department of Treasury's approach.

Petitioners also suggest that a regulation aligning the basic definitions of RRTA "compensation" and FICA "wages"—subject to the distinct (though overlapping) express exclusions in the two statutes—would be unreasonable under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), because it effectively "excise[s]" "the word 'money' * * * from the statute." Pets. Br. 48. That is incorrect. Now, as when the RRTA was enacted, the word "money" in the RRTA definition limits taxable "compensation" to payments that can be readily valued in or converted to cash. But Congress subsequently amended both the FICA and the RRTA to address hard-to-value fringe benefits and generally exclude them from taxation. See 26 U.S.C. 3121(a)(20), 3231(e)(5). Along with other parallel exclusions, Congress has also enacted parallel subsections that address in detail employer-provided meals and lodging under the FICA, see 26 U.S.C. 3121(a)(19), and under the RRTA, see 26 U.S.C. 3231(e)(9). It was not unreasonable for the Department of Treasury to conclude, after Congress had added these specific provisions to both the RRTA and the FICA, that the respective definitions of taxable "compensation" and "wages" do not now have materially different meanings, except where the statutes' enumerated exceptions differ. See 26 C.F.R. 31.3231(e)-1(a).

Petitioners also argue (Br. 42-45) that provisions that use distinct language—as the definitional provisions in the RRTA and the FICA do—cannot reasonably be treated as largely parallel. But while this Court has reasoned that Congress's decision to "include[] particular language in one section of a statute but omit[] it in another" triggers a "presum[ption] that Congress intended a difference in meaning," *Digital Realty Trust, Inc.* v. *Somers*, No. 16-1276 (Feb. 21, 2018), slip op. 10 (quoting *Loughrin* v. *United States*, 134 S. Ct. 2384, 2390 (2014)), this Court has consistently treated that principle as one limited to different words in provisions of the same statute or statutes that were derived from one another. See, *e.g.*, *Department of Homeland Sec.* v. *MacLean*, 135 S. Ct. 913, 919 (2015) (citing *Russello* v. *United States*, 464 U.S. 16, 23 (1983)). The decisions of this Court on which petitioners rely (Br. 42-45) accordingly involve provisions of the same statute, see *Burlington N. & Santa Fe Ry. Co.* v. *White*, 548 U.S. 53, 62-63 (2006) (substantive and anti-retaliation provisions of Title VII of the Civil Rights Act of 1964); *Russello*, 464 U.S. at 23 (language in different subsections of the Racketeer Influenced and Corrupt Organizations Act), or "cognate[s]" derived from the same statutory provision, see Antonin Scalia & Bryan A. Garner, *Reading the Law: The Interpretation of Legal Texts* 254 (2012) (discussing *United States* v. *Ressam*, 553 U.S. 272, 276-277 (2008)).

Moreover, even in the context of a single statute, this Court has never treated the principle that the different words should be assigned different meaning as one that can displace the best interpretation of statutory language derived from the text itself, or from history or context. On the contrary, this Court has cautioned that

"there is no 'canon of interpretation that forbids interpreting different words used in different parts of the same statute to mean roughly the same thing.'" *Jennings* v. *Rodriguez*, No. 15-1204 (Feb. 27, 2018), slip op. 19 (quoting *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 568 U.S. 519, 540 (2013)); see *Tyler* v. *Cain*, 533 U.S. 656, 664 (2001) (explaining that "Congress * * * is permitted to use synonyms in a statute" and that "determined" and "held" were synonyms). And it has described the principle that "use of 'certain language in one part of the statute and different language in another' can indicate that 'different meanings were intended'" as "no more than a rule of thumb." *Auburn Reg'l Med. Ctr.*, 568 U.S. at 156 (brackets and citations omitted).[11]

Finally, petitioners are wrong in suggesting that the Department of Treasury's regulation would "nullify 26 U.S.C. § 3121(b)(9), which provides that FICA is inapplicable to railroads." Pets. Br. 49 (emphasis omit-

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[11] Petitioners also suggest (Pets. Br. 10-11) that Congress must have intended the RRTA's basic definition of taxable "compensation" to differ from FICA "wages" because in 1992, Congress did not enact a piece of major economic legislation, one provision of which would have directly adopted FICA's definition of "wages" in the RRTA context. See S. 2216, 102d Cong., 2d Sess. (1992); H.R. 4150, 102d Cong., 2d Sess. (1992). But reasoning from failed legislation is generally inappropriate, because many explanations can explain Congress's failure to enact a particular measure, including the possibility that Congress thought existing law already embodied the principle in the proposed new law. See, *e.g.*, *Star Athletica, LLC* v. *Varsity Brands, Inc.*, 137 S. Ct. 1002, 1015 (2017) (finding unilluminating the "history of failed legislation" on which a litigant had relied, in reliance on the principle that "'[c]ongressional inaction lacks persuasive significance' in most circumstances") (quoting *Pension Benefit Guar. Corp.* v. *The LTV Corp.*, 496 U.S. 633, 650 (1990)) (brackets in original).

ted). By exempting railroad workers from FICA taxation, Section 3121(b)(9) ensures that compensation of railroad employees is not taxed under both the RRTA and the FICA. The regulatory definition of RRTA "compensation" does not create any risk of the double taxation that Section 3121(b)(9) is intended to prevent.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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MARCH 2018

APPENDIX

1. 26 U.S.C. 3231(e) provides:

Subchapter D—General Provisions [RRTA]

Definitions

(e) Compensation

For purposes of this chapter—

(1) The term "compensation" means any form of money remuneration paid to an individual for services rendered as an employee to one or more employers. Such term does not include (i) the amount of any payment (including any amount paid by an employer for insurance or annuities, or into a fund, to provide for any such payment) made to, or on behalf of, an employee or any of his dependents under a plan or system established by an employer which makes provision for his employees generally (or for his employees generally and their dependents) or for a class or classes of his employees (or for a class or classes of his employees and their dependents), on account of sickness or accident disability or medical or hospitalization expenses in connection with sickness or accident disability or death, except that this clause does not apply to a payment for group-term life insurance to the extent that such payment is includible in the gross income of the employee, (ii) tips (except as is provided under paragraph (3)), (iii) an amount paid specifically—either as an advance, as reimbursement or allowance—for traveling or other bona fide and necessary expenses incurred or reasonably expected to be incurred in the business of the employer provided any such payment is iden-

tified by the employer either by a separate payment or by specifically indicating the separate amounts where both wages and expense reimbursement or allowance are combined in a single payment, or (iv) any remuneration which would not (if chapter 21 applied to such remuneration) be treated as wages (as defined in section 3121(a)) by reason of section 3121(a)(5). Such term does not include remuneration for service which is performed by a nonresident alien individual for the period he is temporarily present in the United States as a nonimmigrant under subparagraph (F), (J), (M), or (Q) of section 101(a)(15) of the Immigration and Nationality Act, as amended, and which is performed to carry out the purpose specified in subparagraph (F), (J), (M), or (Q), as the case may be. For the purpose of determining the amount of taxes under sections 3201 and 3221, compensation earned in the service of a local lodge or division of a railway-labor-organization employer shall be disregarded with respect to any calendar month if the amount thereof is less than $25. Compensation for service as a delegate to a national or international convention of a railway labor organization defined as an "employer" in subsection (a) of this section shall be disregarded for purposes of determining the amount of taxes due pursuant to this chapter if the individual rendering such service has not previously rendered service, other than as such a delegate, which may be included in his "years of service" for purposes of the Railroad Retirement Act. Nothing in the regulations prescribed for purposes of chapter 24 (relating to wage withholding) which provides an exclusion from

"wages" as used in such chapter shall be construed to require a similar exclusion from "compensation" in regulations prescribed for purposes of this chapter.

(2) Application of contribution bases

(A) Compensation in excess of applicable base excluded

(i) In general

The term "compensation" does not include that part of remuneration paid during any calendar year to an individual by an employer after remuneration equal to the applicable base has been paid during such calendar year to such individual by such employer for services rendered as an employee to such employer.

(ii) Remuneration not treated as compensation excluded

There shall not be taken into account under clause (i) remuneration which (without regard to clause (i)) is not treated as compensation under this subsection.

(iii) Hospital insurance taxes

Clause (i) shall not apply to—

(I) so much of the rate applicable under section 3201(a) or 3221(a) as does not exceed the rate of tax in effect under section 3101(b), and

(II) so much of the rate applicable under section 3211(a) as does not exceed the rate of tax in effect under section 1401(b).

(B) Applicable base

(i) Tier 1 taxes

Except as provided in clause (ii), the term "applicable base" means for any calendar year the contribution and benefit base determined under section 230 of the Social Security Act for such calendar year.

(ii) Tier 2 taxes, etc.

For purposes of—

(I) the taxes imposed by sections 3201(b), 3211(b), and 3221(b), and

(II) computing average monthly compensation under section 3(j) of the Railroad Retirement Act of 1974 (except with respect to annuity amounts determined under subsection (a) or (f)(3) of section 3 of such Act),

clause (2) of the first sentence, and the second sentence, of subsection (c) of section 230 of the Social Security Act shall be disregarded.

(C) Successor employers

For purposes of this paragraph, the second sentence of section 3121(a)(1) (relating to successor employers) shall apply, except that—

(i) the term "services" shall be substituted for "employment" each place it appears,

(ii) the term "compensation" shall be substituted for "remuneration (other than remuneration referred to in the succeeding paragraphs of this subsection)" each place it appears, and

(iii) the terms "employer", "services", and "compensation" shall have the meanings given such terms by this section.

(3) Solely for purposes of the taxes imposed by section 3201 and other provisions of this chapter insofar as they relate to such taxes, the term "compensation" also includes cash tips received by an employee in any calendar month in the course of his employment by an employer unless the amount of such cash tips is less than $20.

(4)(A) For purposes of applying sections 3201(a), 3211(a), and 3221(a), in the case of payments made to an employee or any of his dependents on account of sickness or accident disability, clause (i) of the second sentence of paragraph (1) shall exclude from the term "compensation" only—

(i) payments which are received under a workmen's compensation law, and

(ii) benefits received under the Railroad Retirement Act of 1974.

(B) Notwithstanding any other provision of law, for purposes of the sections specified in subparagraph (A), the term "compensation" shall include benefits

paid under section 2(a) of the Railroad Unemployment Insurance Act for days of sickness, except to the extent that such sickness (as determined in accordance with standards prescribed by the Railroad Retirement Board) is the result of on-the-job injury.

(C) Under regulations prescribed by the Secretary, subparagraphs (A) and (B) shall not apply to payments made after the expiration of a 6-month period comparable to the 6-month period described in section 3121(a)(4).

(D) Except as otherwise provided in regulations prescribed by the Secretary, any third party which makes a payment included in compensation solely by reason of subparagraph (A) or (B) shall be treated for purposes of this chapter as the employer with respect to such compensation.

(5) The term "compensation" shall not include any benefit provided to or on behalf of an employee if at the time such benefit is provided it is reasonable to believe that the employee will be able to exclude such benefit from income under section 74(c), 108(f)(4), 117, or 132.

(6) The term "compensation" shall not include any payment made, or benefit furnished, to or for the benefit of an employee if at the time of such payment or such furnishing it is reasonable to believe that the employee will be able to exclude such payment or benefit from income under section 127.

[(7) Repealed. Pub. L. 113–295, div. A, title II, § 221(a)(19)(B)(v), Dec. 19, 2014, 128 Stat. 4040.]

(8) Treatment of certain deferred compensation and salary reduction arrangements

(A) Certain employer contributions treated as compensation

Nothing in any paragraph of this subsection (other than paragraph (2)) shall exclude from the term "compensation" any amount described in subparagraph (A) or (B) of section 3121(v)(1).

(B) Treatment of certain nonqualified deferred compensation

The rules of section 3121(v)(2) which apply for purposes of chapter 21 shall also apply for purposes of this chapter.

(9) Meals and lodging

The term "compensation" shall not include the value of meals or lodging furnished by or on behalf of the employer if at the time of such furnishing it is reasonable to believe that the employee will be able to exclude such items from income under section 119.

(10) Archer MSA contributions

The term "compensation" shall not include any payment made to or for the benefit of an employee if at the time of such payment it is reasonable to believe that the employee will be able to exclude such payment from income under section 106(b).

(11) Health savings account contributions

The term "compensation" shall not include any payment made to or for the benefit of an employee if

at the time of such payment it is reasonable to believe that the employee will be able to exclude such payment from income under section 106(d).

(12) Qualified stock options

The term "compensation" shall not include any remuneration on account of—

(A) a transfer of a share of stock to any individual pursuant to an exercise of an incentive stock option (as defined in section 422(b)) or under an employee stock purchase plan (as defined in section 423(b)), or

(B) any disposition by the individual of such stock.

2. 26 U.S.C. 74(c) provides:

PART II—ITEMS SPECIFICALLY INCLUDED IN GROSS INCOME [INTERNAL REVENUE CODE]

Prizes and awards

(c) Exception for certain employee achievement awards

(1) In general

Gross income shall not include the value of an employee achievement award (as defined in section 274(j)) received by the taxpayer if the cost to the employer of the employee achievement award does not exceed the amount allowable as a deduction to the employer for the cost of the employee achievement award.

(2) Excess deduction award

If the cost to the employer of the employee achievement award received by the taxpayer exceeds the amount allowable as a deduction to the employer, then gross income includes the greater of—

(A) an amount equal to the portion of the cost to the employer of the award that is not allowable as a deduction to the employer (but not in excess of the value of the award), or

(B) the amount by which the value of the award exceeds the amount allowable as a deduction to the employer.

The remaining portion of the value of such award shall not be included in the gross income of the recipient.

(3) Treatment of tax-exempt employers

In the case of an employer exempt from taxation under this subtitle, any reference in this subsection to the amount allowable as a deduction to the employer shall be treated as a reference to the amount which would be allowable as a deduction to the employer if the employer were not exempt from taxation under this subtitle.

(4) Cross reference

For provisions excluding certain de minimis fringes from gross income, see section 132(e).

3. 26 U.S.C. 119 provides:

PART III—ITEMS SPECIFICALLY EXCLUDED FROM GROSS INCOME [INTERNAL REVENUE CODE]

Meals or lodging furnished for the convenience of the employer

(a) Meals and lodging furnished to employee, his spouse, and his dependents, pursuant to employment

There shall be excluded from gross income of an employee the value of any meals or lodging furnished to him, his spouse, or any of his dependents by or on behalf of his employer for the convenience of the employer, but only if—

(1) in the case of meals, the meals are furnished on the business premises of the employer, or

(2) in the case of lodging, the employee is required to accept such lodging on the business premises of his employer as a condition of his employment.

(b) Special rules

For purposes of subsection (a)—

(1) Provisions of employment contract or State statute not to be determinative

In determining whether meals or lodging are furnished for the convenience of the employer, the provisions of an employment contract or of a State statute fixing terms of employment shall not be determinative of whether the meals or lodging are intended as compensation.

(2) Certain factors not taken into account with respect to meals

In determining whether meals are furnished for the convenience of the employer, the fact that a charge is made for such meals, and the fact that the employee may accept or decline such meals, shall not be taken into account.

(3) Certain fixed charges for meals

(A) In general

If—

(i) an employee is required to pay on a periodic basis a fixed charge for his meals, and

(ii) such meals are furnished by the employer for the convenience of the employer,

there shall be excluded from the employee's gross income an amount equal to such fixed charge.

(B) Application of subparagraph (A)

Subparagraph (A) shall apply—

(i) whether the employee pays the fixed charge out of his stated compensation or out of his own funds, and

(ii) only if the employee is required to make the payment whether he accepts or declines the meals.

(4) Meals furnished to employees on business premises where meals of most employees are otherwise excludable

All meals furnished on the business premises of an employer to such employer's employees shall be treated as furnished for the convenience of the employer if, without regard to this paragraph, more than half of the employees to whom such meals are furnished on such premises are furnished such meals for the convenience of the employer.

(c) Employees living in certain camps

(1) In general

In the case of an individual who is furnished lodging in a camp located in a foreign country by or on behalf of his employer, such camp shall be considered to be part of the business premises of the employer.

(2) Camp

For purposes of this section, a camp constitutes lodging which is—

(A) provided by or on behalf of the employer for the convenience of the employer because the place at which such individual renders services is in a remote area where satisfactory housing is not available on the open market,

(B) located, as near as practicable, in the vicinity of the place at which such individual renders services, and

(C) furnished in a common area (or enclave) which is not available to the public and which normally accommodates 10 or more employees.

(d) Lodging furnished by certain educational institutions to employees

(1) In general

In the case of an employee of an educational institution, gross income shall not include the value of qualified campus lodging furnished to such employee during the taxable year.

(2) Exception in cases of inadequate rent

Paragraph (1) shall not apply to the extent of the excess of—

(A) the lesser of—

(i) 5 percent of the appraised value of the qualified campus lodging, or

(ii) the average of the rentals paid by individuals (other than employees or students of the educational institution) during such calendar year for lodging provided by the educational institution which is comparable to the qualified campus lodging provided to the employee, over

(B) the rent paid by the employee for the qualified campus lodging during such calendar year.

The appraised value under subparagraph (A)(i) shall be determined as of the close of the calendar year in which the taxable year begins, or, in the case of a

rental period not greater than 1 year, at any time during the calendar year in which such period begins.

(3) Qualified campus lodging

For purposes of this subsection, the term "qualified campus lodging" means lodging to which subsection (a) does not apply and which is—

(A) located on, or in the proximity of, a campus of the educational institution, and

(B) furnished to the employee, his spouse, and any of his dependents by or on behalf of such institution for use as a residence.

(4) Educational institution, etc.

For purposes of this subsection—

(A) In general

The term "educational institution" means—

(i) an institution described in section 170(b)(1)(A)(ii) (or an entity organized under State law and composed of public institutions so described), or

(ii) an academic health center.

(B) Academic health center

For purposes of subparagraph (A), the term "academic health center" means an entity—

(i) which is described in section 170(b)(1)(A)(iii),

(ii) which receives (during the calendar year in which the taxable year of the taxpayer begins) payments under subsection (d)(5)(B) or (h) of section 1886 of the Social Security Act (relating to graduate medical education), and

(iii) which has as one of its principal purposes or functions the providing and teaching of basic and clinical medical science and research with the entity's own faculty.

4. 26 U.S.C. 132 provides in pertinent part:

PART III—ITEMS SPECIFICALLY EXCLUDED FROM GROSS INCOME [INTERNAL REVENUE CODE]

(a) Exclusion from gross income

Gross income shall not include any fringe benefit which qualifies as a—

(1) no-additional-cost service,

(2) qualified employee discount,

(3) working condition fringe,

(4) de minimis fringe,

(5) qualified transportation fringe,

(6) qualified moving expense reimbursement,

(7) qualified retirement planning services, or

(8) qualified military base realignment and closure fringe.

(b) No-additional-cost service defined

For purposes of this section, the term "no-additional-cost service" means any service provided by an employer to an employee for use by such employee if—

(1) such service is offered for sale to customers in the ordinary course of the line of business of the employer in which the employee is performing services, and

(2) the employer incurs no substantial additional cost (including forgone revenue) in providing such service to the employee (determined without regard to any amount paid by the employee for such service).

* * * * *

(d) Working condition fringe defined

For purposes of this section, the term "working condition fringe" means any property or services provided to an employee of the employer to the extent that, if the employee paid for such property or services, such payment would be allowable as a deduction under section 162 or 167.

(e) De minimis fringe defined

For purposes of this section—

(1) In general

The term "de minimis fringe" means any property or service the value of which is (after taking into account the frequency with which similar fring-

es are provided by the employer to the employer's employees) so small as to make accounting for it unreasonable or administratively impracticable.

(2) Treatment of certain eating facilities

The operation by an employer of any eating facility for employees shall be treated as a de minimis fringe if—

(A) such facility is located on or near the business premises of the employer, and

(B) revenue derived from such facility normally equals or exceeds the direct operating costs of such facility.

The preceding sentence shall apply with respect to any highly compensated employee only if access to the facility is available on substantially the same terms to each member of a group of employees which is defined under a reasonable classification set up by the employer which does not discriminate in favor of highly compensated employees. For purposes of subparagraph (B), an employee entitled under section 119 to exclude the value of a meal provided at such facility shall be treated as having paid an amount for such meal equal to the direct operating costs of the facility attributable to such meal.

(f) Qualified transportation fringe

(1) In general

For purposes of this section, the term "qualified transportation fringe" means any of the following provided by an employer to an employee:

(A) Transportation in a commuter highway vehicle if such transportation is in connection with travel between the employee's residence and place of employment.

(B) Any transit pass.

(C) Qualified parking.

(D) Any qualified bicycle commuting reimbursement.

(2) Limitation on exclusion

The amount of the fringe benefits which are provided by an employer to any employee and which may be excluded from gross income under subsection (a)(5) shall not exceed—

(A) $175 per month in the case of the aggregate of the benefits described in subparagraphs (A) and (B) of paragraph (1),

(B) $175 per month in the case of qualified parking, and

(C) the applicable annual limitation in the case of any qualified bicycle commuting reimbursement.

(3) Cash reimbursements

For purposes of this subsection, the term "qualified transportation fringe" includes a cash reimbursement by an employer to an employee for a benefit described in paragraph (1). The preceding sentence shall apply to a cash reimbursement for any transit pass only if a voucher or similar item which may be exchanged only for a transit pass is

not readily available for direct distribution by the employer to the employee.

(4) No constructive receipt

No amount shall be included in the gross income of an employee solely because the employee may choose between any qualified transportation fringe (other than a qualified bicycle commuting reimbursement) and compensation which would otherwise be includible in gross income of such employee.

(5) Definitions

For purposes of this subsection—

(A) Transit pass

The term "transit pass" means any pass, token, farecard, voucher, or similar item entitling a person to transportation (or transportation at a reduced price) if such transportation is—

(i) on mass transit facilities (whether or not publicly owned), or

(ii) provided by any person in the business of transporting persons for compensation or hire if such transportation is provided in a vehicle meeting the requirements of subparagraph (B)(i).

(B) Commuter highway vehicle

The term "commuter highway vehicle" means any highway vehicle—

(i) the seating capacity of which is at least 6 adults (not including the driver), and

(ii) at least 80 percent of the mileage use of which can reasonably be expected to be—

(I) for purposes of transporting employees in connection with travel between their residences and their place of employment, and

(II) on trips during which the number of employees transported for such purposes is at least ½ of the adult seating capacity of such vehicle (not including the driver).

(C) Qualified parking

The term "qualified parking" means parking provided to an employee on or near the business premises of the employer or on or near a location from which the employee commutes to work by transportation described in subparagraph (A), in a commuter highway vehicle, or by carpool. Such term shall not include any parking on or near property used by the employee for residential purposes.

(D) Transportation provided by employer

Transportation referred to in paragraph (1)(A) shall be considered to be provided by an employer if such transportation is furnished in a commuter highway vehicle operated by or for the employer.

(E) Employee

For purposes of this subsection, the term "employee" does not include an individual who is

an employee within the meaning of section 401(c)(1).

(F) Definitions related to bicycle commuting reimbursement

(i) Qualified bicycle commuting reimbursement

The term "qualified bicycle commuting reimbursement" means, with respect to any calendar year, any employer reimbursement during the 15-month period beginning with the first day of such calendar year for reasonable expenses incurred by the employee during such calendar year for the purchase of a bicycle and bicycle improvements, repair, and storage, if such bicycle is regularly used for travel between the employee's residence and place of employment.

(ii) Applicable annual limitation

The term "applicable annual limitation" means, with respect to any employee for any calendar year, the product of $20 multiplied by the number of qualified bicycle commuting months during such year.

(iii) Qualified bicycle commuting month

The term "qualified bicycle commuting month" means, with respect to any employee, any month during which such employee—

(I) regularly uses the bicycle for a substantial portion of the travel between the

employee's residence and place of employment, and

(II) does not receive any benefit described in subparagraph (A), (B), or (C) of paragraph (1).

(6) Inflation adjustment

(A) In general

In the case of any taxable year beginning in a calendar year after 1999, the dollar amounts contained in subparagraphs (A) and (B) of paragraph (2) shall be increased by an amount equal to—

(i) such dollar amount, multiplied by

(ii) the cost-of-living adjustment determined under section 1(f)(3) for the calendar year in which the taxable year begins, by substituting "calendar year 1998" for "calendar year 2016" in subparagraph (A)(ii) thereof.

In the case of any taxable year beginning in a calendar year after 2002, clause (ii) shall be applied by substituting "calendar year 2001" for "calendar year 1998" for purposes of adjusting the dollar amount contained in paragraph (2)(A).

(B) Rounding

If any increase determined under subparagraph (A) is not a multiple of $5, such increase shall be rounded to the next lowest multiple of $5.

(7) Coordination with other provisions

For purposes of this section, the terms "working condition fringe" and "de minimis fringe" shall not include any qualified transportation fringe (determined without regard to paragraph (2)).

(8) Suspension of qualified bicycle commuting reimbursement exclusion

Paragraph (1)(D) shall not apply to any taxable year beginning after December 31, 2017, and before January 1, 2026.

* * * * *

5. 26 U.S.C. 274(j)(3)(A) provides:

PART IX—ITEMS NOT DEDUCTIBLE [INTERNAL REVENUE CODE]

Disallowance of certain entertainment, etc., expenses

(j) Employee achievement awards

(3) Definitions

For purposes of this subsection—

(A) Employee achievement award

(i) In general

The term "employee achievement award" means an item of tangible personal property which is—

(I) transferred by an employer to an employee for length of service achievement or safety achievement.

(II) awarded as part of a meaningful presentation, and

(III) awarded under conditions and circumstances that do not create a significant likelihood of the payment of the disguised compensation.

(ii) Tangible personal property

For purposes of clause (i), the term "tangible personal property" shall not include—

(I) cash, cash equivalents, gift cards, gift coupons, or gift certificates (other than arrangements conferring only the right to select and receive tangible personal property from a limited array of such items preselected or pre-approved by the employer), or

(II) vacations, meals, lodging, tickets to theater or sporting events, stocks, bonds, other securities, and other similar items.

6. 26 U.S.C. 3121 (2012 & Supp. IV 2016) provides:

Subchapter C—General Provisions [FICA]

Definitions

(a) Wages

For purposes of this chapter, the term "wages" means all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash; except that such term shall not include—

(1) in the case of the taxes imposed by sections 3101(a) and 3111(a) that part of the remuneration which, after remuneration (other than remuneration referred to in the succeeding paragraphs of this subsection) equal to the contribution and benefit base (as determined under section 230 of the Social Security Act) with respect to employment has been paid to an individual by an employer during the calendar year with respect to which such contribution and benefit base is effective, is paid to such individual by such employer during such calendar year. If an employer (hereinafter referred to as successor employer) during any calendar year acquires substantially all the property used in a trade or business of another employer (hereinafter referred to as a predecessor), or used in a separate unit of a trade or business of a predecessor, and immediately after the acquisition employs in his trade or business an individual who immediately prior to the acquisition was employed in the trade or business of such predecessor, then, for the purpose of determining whether the successor employer has paid remunera-

tion (other than remuneration referred to in the succeeding paragraphs of this subsection) with respect to employment equal to the contribution and benefit base (as determined under section 230 of the Social Security Act) to such individual during such calendar year, any remuneration (other than remuneration referred to in the succeeding paragraphs of this subsection) with respect to employment paid (or considered under this paragraph as having been paid) to such individual by such predecessor during such calendar year and prior to such acquisition shall be considered as having been paid by such successor employer;

(2) the amount of any payment (including any amount paid by an employer for insurance or annuities, or into a fund, to provide for any such payment) made to, or on behalf of, an employee or any of his dependents under a plan or system established by an employer which makes provision for his employees generally (or for his employees generally and their dependents) or for a class or classes of his employees (or for a class or classes of his employees and their dependents), on account of—

(A) sickness or accident disability (but, in the case of payments made to an employee or any of his dependents, this subparagraph shall exclude from the term "wages" only payments which are received under a workman's compensation law), or

(B) medical or hospitalization expenses in connection with sickness or accident disability, or

(C) death, except that this paragraph does not apply to a payment for group-term life insurance to the extent that such payment is includible in the gross income of the employee;

[(3) Repealed. Pub. L. 98–21, title III, § 324(a)(3)(B), Apr. 20, 1983, 97 Stat. 123]

(4) any payment on account of sickness or accident disability, or medical or hospitalization expenses in connection with sickness or accident disability, made by an employer to, or on behalf of, an employee after the expiration of 6 calendar months following the last calendar month in which the employee worked for such employer;

(5) any payment made to, or on behalf of, an employee or his beneficiary—

(A) from or to a trust described in section 401(a) which is exempt from tax under section 501(a) at the time of such payment unless such payment is made to an employee of the trust as remuneration for services rendered as such employee and not as a beneficiary of the trust,

(B) under or to an annuity plan which, at the time of such payment, is a plan described in section 403(a),

(C) under a simplified employee pension (as defined in section 408(k)(1)), other than any contributions described in section 408(k)(6),

(D) under or to an annuity contract described in section 403(b), other than a payment for the purchase of such contract which is made by rea-

son of a salary reduction agreement (whether evidenced by a written instrument or otherwise),

(E) under or to an exempt governmental deferred compensation plan (as defined in subsection (v)(3)),

(F) to supplement pension benefits under a plan or trust described in any of the foregoing provisions of this paragraph to take into account some portion or all of the increase in the cost of living (as determined by the Secretary of Labor) since retirement but only if such supplemental payments are under a plan which is treated as a welfare plan under section 3(2)(B)(ii) of the Employee Retirement Income Security Act of 1974,

(G) under a cafeteria plan (within the meaning of section 125) if such payment would not be treated as wages without regard to such plan and it is reasonable to believe that (if section 125 applied for purposes of this section) section 125 would not treat any wages as constructively received,

(H) under an arrangement to which section 408(p) applies, other than any elective contributions under paragraph (2)(A)(i) thereof, or

(I) under a plan described in section 457(e)(11)(A)(ii) and maintained by an eligible employer (as defined in section 457(e)(1));

(6) the payment by an employer (without deduction from the remuneration of the employee)—

(A) of the tax imposed upon an employee under section 3101, or

(B) of any payment required from an employee under a State unemployment compensation law,

with respect to remuneration paid to an employee for domestic service in a private home of the employer or for agricultural labor;

(7)(A) remuneration paid in any medium other than cash to an employee for service not in the course of the employer's trade or business or for domestic service in a private home of the employer;

(B) cash remuneration paid by an employer in any calendar year to an employee for domestic service in a private home of the employer (including domestic service on a farm operated for profit), if the cash remuneration paid in such year by the employer to the employee for such service is less than the applicable dollar threshold (as defined in subsection (x)) for such year;

(C) cash remuneration paid by an employer in any calendar year to an employee for service not in the course of the employer's trade or business, if the cash remuneration paid in such year by the employer to the employee for such service is less than $100. As used in this subparagraph, the term "service not in the course of the employer's trade or business" does not include domestic service in a private home of the employer and does not include service described in subsection (g)(5);

(8)(A) remuneration paid in any medium other than cash for agricultural labor;

(B) cash remuneration paid by an employer in any calendar year to an employee for agricultural labor unless—

(i) the cash remuneration paid in such year by the employer to the employee for such labor is $150 or more, or

(ii) the employer's expenditures for agricultural labor in such year equal or exceed $2,500,

except that clause (ii) shall not apply in determining whether remuneration paid to an employee constitutes "wages" under this section if such employee (I) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (II) commutes daily from his permanent residence to the farm on which he is so employed, and (III) has been employed in agriculture less than 13 weeks during the preceding calendar year;

[(9) Repealed. Pub. L. 98–21, title III, § 324(a)(3)(B), Apr. 20, 1983, 97 Stat. 123]

(10) remuneration paid by an employer in any calendar year to an employee for service described in subsection (d)(3)(C) (relating to home workers), if the cash remuneration paid in such year by the employer to the employee for such service is less than $100;

(11) remuneration paid to or on behalf of an employee if (and to the extent that) at the time of the payment of such remuneration it is reasonable to believe that a corresponding deduction is allowable under section 217 (determined without regard to section 274(n));

(12)(A) tips paid in any medium other than cash;

(B) cash tips received by an employee in any calendar month in the course of his employment by an employer unless the amount of such cash tips is $20 or more;

(13) any payment or series of payments by an employer to an employee or any of his dependents which is paid—

(A) upon or after the termination of an employee's employment relationship because of (i) death, or (ii) retirement for disability, and

(B) under a plan established by the employer which makes provision for his employees generally or a class or classes of his employees (or for such employees or class or classes of employees and their dependents),

other than any such payment or series of payments which would have been paid if the employee's employment relationship had not been so terminated;

(14) any payment made by an employer to a survivor or the estate of a former employee after the calendar year in which such employee died;

(15) any payment made by an employer to an employee, if at the time such payment is made such employee is entitled to disability insurance benefits under section 223(a) of the Social Security Act and such entitlement commenced prior to the calendar year in which such payment is made, and if such employee did not perform any services for such employer during the period for which such payment is made;

(16) remuneration paid by an organization exempt from income tax under section 501(a) (other than an organization described in section 401(a)) or under section 521 in any calendar year to an employee for service rendered in the employ of such organization, if the remuneration paid in such year by the organization to the employee for such service is less than $100;

[(17) Repealed. Pub. L. 113–295, div. A, title II, § 221(a)(19)(B)(iv), Dec. 19, 2014, 128 Stat. 4040]

(18) any payment made, or benefit furnished, to or for the benefit of an employee if at the time of such payment or such furnishing it is reasonable to believe that the employee will be able to exclude such payment or benefit from income under section 127, 129, 134(b)(4), or 134(b)(5);

(19) the value of any meals or lodging furnished by or on behalf of the employer if at the time of such furnishing it is reasonable to believe that the employee will be able to exclude such items from income under section 119;

(20) any benefit provided to or on behalf of an employee if at the time such benefit is provided it is reasonable to believe that the employee will be able to exclude such benefit from income under section 74(c), 108(f)(4), 117, or 132;

(21) in the case of a member of an Indian tribe, any remuneration on which no tax is imposed by this chapter by reason of section 7873 (relating to income derived by Indians from exercise of fishing rights);

(22) remuneration on account of—

(A) a transfer of a share of stock to any individual pursuant to an exercise of an incentive stock option (as defined in section 422(b)) or under an employee stock purchase plan (as defined in section 423(b)), or

(B) any disposition by the individual of such stock; or

(23) any benefit or payment which is excludable from the gross income of the employee under section 139B(b).

Nothing in the regulations prescribed for purposes of chapter 24 (relating to income tax withholding) which provides an exclusion from "wages" as used in such chapter shall be construed to require a similar exclusion from "wages" in the regulations prescribed for purposes of this chapter. Except as otherwise provided in regulations prescribed by the Secretary, any third party which makes a payment included in wages solely by reason of the parenthetical matter contained in subparagraph (A) of paragraph (2) shall be treated

for purposes of this chapter and chapter 22 as the employer with respect to such wages.

(b) Employment

For purposes of this chapter, the term "employment" means any service, of whatever nature, performed (A) by an employee for the person employing him, irrespective of the citizenship or residence of either, (i) within the United States, or (ii) on or in connection with an American vessel or American aircraft under a contract of service which is entered into within the United States or during the performance of which and while the employee is employed on the vessel or aircraft it touches at a port in the United States, if the employee is employed on and in connection with such vessel or aircraft when outside the United States, or (B) outside the United States by a citizen or resident of the United States as an employee for an American employer (as defined in subsection (h)), or (C) if it is service, regardless of where or by whom performed, which is designated as employment or recognized as equivalent to employment under an agreement entered into under section 233 of the Social Security Act; except that such term shall not include—

(1) service performed by foreign agricultural workers lawfully admitted to the United States from the Bahamas, Jamaica, and the other British West Indies, or from any other foreign country or possession thereof, on a temporary basis to perform agricultural labor;

(2) domestic service performed in a local college club, or local chapter of a college fraternity or so-

rority, by a student who is enrolled and is regularly attending classes at a school, college, or university;

(3)(A) service performed by a child under the age of 18 in the employ of his father or mother;

(B) service not in the course of the employer's trade or business, or domestic service in a private home of the employer, performed by an individual under the age of 21 in the employ of his father or mother, or performed by an individual in the employ of his spouse or son or daughter; except that the provisions of this subparagraph shall not be applicable to such domestic service performed by an individual in the employ of his son or daughter if—

(i) the employer is a surviving spouse or a divorced individual and has not remarried, or has a spouse living in the home who has a mental or physical condition which results in such spouse's being incapable of caring for a son, daughter, stepson, or stepdaughter (referred to in clause (ii)) for at least 4 continuous weeks in the calendar quarter in which the service is rendered, and

(ii) a son, daughter, stepson, or stepdaughter of such employer is living in the home, and

(iii) the son, daughter, stepson, or stepdaughter (referred to in clause (ii)) has not attained age 18 or has a mental or physical condition which requires the personal care and supervision of an adult for at least 4 continuous weeks in the calendar quarter in which the service is rendered;

(4) service performed by an individual on or in connection with a vessel not an American vessel, or on or in connection with an aircraft not an American aircraft, if (A) the individual is employed on and in connection with such vessel or aircraft, when outside the United States and (B)(i) such individual is not a citizen of the United States or (ii) the employer is not an American employer;

(5) service performed in the employ of the United States or any instrumentality of the United States, if such service—

(A) would be excluded from the term "employment" for purposes of this title if the provisions of paragraphs (5) and (6) of this subsection as in effect in January 1983 had remained in effect, and

(B) is performed by an individual who—

(i) has been continuously performing service described in subparagraph (A) since December 31, 1983, and for purposes of this clause—

(I) if an individual performing service described in subparagraph (A) returns to the performance of such service after being separated therefrom for a period of less than 366 consecutive days, regardless of whether the period began before, on, or after December 31, 1983, then such service shall be considered continuous,

(II) if an individual performing service described in subparagraph (A) returns to the performance of such service after being detailed or transferred to an international organization as described under section 3343 of subchapter III of chapter 33 of title 5, United States Code, or under section 3581 of chapter 35 of such title, then the service performed for that organization shall be considered service described in subparagraph (A),

(III) if an individual performing service described in subparagraph (A) is reemployed or reinstated after being separated from such service for the purpose of accepting employment with the American Institute in Taiwan as provided under section 3310 of chapter 48 of title 22, United States Code, then the service performed for that Institute shall be considered service described in subparagraph (A),

(IV) if an individual performing service described in subparagraph (A) returns to the performance of such service after performing service as a member of a uniformed service (including, for purposes of this clause, service in the National Guard and temporary service in the Coast Guard Reserve) and after exercising restoration or reemployment rights as provided under chapter 43 of title 38, United States Code, then the service so performed as a member

of a uniformed service shall be considered service described in subparagraph (A), and

(V) if an individual performing service described in subparagraph (A) returns to the performance of such service after employment (by a tribal organization) to which section 105(e)(2)[1] of the Indian Self-Determination Act applies, then the service performed for that tribal organization shall be considered service described in subparagraph (A); or

(ii) is receiving an annuity from the Civil Service Retirement and Disability Fund, or benefits (for service as an employee) under another retirement system established by a law of the United States for employees of the Federal Government (other than for members of the uniformed service);

except that this paragraph shall not apply with respect to any such service performed on or after any date on which such individual performs—

(C) service performed as the President or Vice President of the United States,

(D) service performed—

(i) in a position placed in the Executive Schedule under sections 5312 through 5317 of title 5, United States Code,

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[1] See References in Text note below.

(ii) as a noncareer appointee in the Senior Executive Service or a noncareer member of the Senior Foreign Service, or

(iii) in a position to which the individual is appointed by the President (or his designee) or the Vice President under section 105(a)(1), 106(a)(1), or 107 (a)(1) or (b)(1) of title 3, United States Code, if the maximum rate of basic pay for such position is at or above the rate for level V of the Executive Schedule,

(E) service performed as the Chief Justice of the United States, an Associate Justice of the Supreme Court, a judge of a United States court of appeals, a judge of a United States district court (including the district court of a territory), a judge of the United States Court of Federal Claims, a judge of the United States Court of International Trade, a judge of the United States Tax Court, a United States magistrate judge, or a referee in bankruptcy or United States bankruptcy judge,

(F) service performed as a Member, Delegate, or Resident Commissioner of or to the Congress,

(G) any other service in the legislative branch of the Federal Government if such service—

(i) is performed by an individual who was not subject to subchapter III of chapter 83 of title 5, United States Code, or to another retirement system established by a law of the United States for employees of the Federal Government (other than for members of the uniformed services), on December 31, 1983, or

(ii) is performed by an individual who has, at any time after December 31, 1983, received a lump-sum payment under section 8342(a) of title 5, United States Code, or under the corresponding provision of the law establishing the other retirement system described in clause (i), or

(iii) is performed by an individual after such individual has otherwise ceased to be subject to subchapter III of chapter 83 of title 5, United States Code (without having an application pending for coverage under such subchapter), while performing service in the legislative branch (determined without regard to the provisions of subparagraph (B) relating to continuity of employment), for any period of time after December 31, 1983,

and for purposes of this subparagraph (G) an individual is subject to such subchapter III or to any such other retirement system at any time only if (a) such individual's pay is subject to deductions, contributions, or similar payments (concurrent with the service being performed at that time) under section 8334(a) of such title 5 or the corresponding provision of the law establishing such other system, or (in a case to which section 8332(k)(1) of such title applies) such individual is making payments of amounts equivalent to such deductions, contributions, or similar payments while on leave without pay, or (b) such individual is receiving an annuity from the Civil Service Retirement and Disability Fund, or is receiving benefits (for service as an employee) under another retirement system established by a law of

the United States for employees of the Federal Government (other than for members of the uniformed services), or

(H) service performed by an individual—

(i) on or after the effective date of an election by such individual, under section 301 of the Federal Employees' Retirement System Act of 1986, section 307 of the Central Intelligence Agency Retirement Act (50 U.S.C. 2157), or the Federal Employees' Retirement System Open Enrollment Act of 1997[2] to become subject to the Federal Employees' Retirement System provided in chapter 84 of title 5, United States Code, or

(ii) on or after the effective date of an election by such individual, under regulations issued under section 860 of the Foreign Service Act of 1980, to become subject to the Foreign Service Pension System provided in subchapter II of chapter 8 of title I of such Act;

(6) service performed in the employ of the United States or any instrumentality of the United States if such service is performed—

(A) in a penal institution of the United States by an inmate thereof;

(B) by any individual as an employee included under section 5351(2) of title 5, United States Code (relating to certain interns, student nurses, and other student employees of hospitals

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[2] So in original. Probably should be followed by a comma.

of the Federal Government), other than as a medical or dental intern or a medical or dental resident in training; or

(C) by any individual as an employee serving on a temporary basis in case of fire, storm, earthquake, flood, or other similar emergency;

(7) service performed in the employ of a State, or any political subdivision thereof, or any instrumentality of any one or more of the foregoing which is wholly owned thereby, except that this paragraph shall not apply in the case of—

(A) service which, under subsection (j), constitutes covered transportation service,

(B) service in the employ of the Government of Guam or the Government of American Samoa or any political subdivision thereof, or of any instrumentality of any one or more of the foregoing which is wholly owned thereby, performed by an officer or employee thereof (including a member of the legislature of any such Government or political subdivision), and, for purposes of this title with respect to the taxes imposed by this chapter—

(i) any person whose service as such an officer or employee is not covered by a retirement system established by a law of the United States shall not, with respect to such service, be regarded as an employee of the United States or any agency or instrumentality thereof, and

(ii) the remuneration for service described in clause (i) (including fees paid to a public official) shall be deemed to have been paid by the Government of Guam or the Government of American Samoa or by a political subdivision thereof or an instrumentality of any one or more of the foregoing which is wholly owned thereby, whichever is appropriate,

(C) service performed in the employ of the District of Columbia or any instrumentality which is wholly owned thereby, if such service is not covered by a retirement system established by a law of the United States (other than the Federal Employees Retirement System provided in chapter 84 of title 5, United States Code); except that the provisions of this subparagraph shall not be applicable to service performed—

(i) in a hospital or penal institution by a patient or inmate thereof;

(ii) by any individual as an employee included under section 5351(2) of title 5, United States Code (relating to certain interns, student nurses, and other student employees of hospitals of the District of Columbia Government), other than as a medical or dental intern or as a medical or dental resident in training;

(iii) by any individual as an employee serving on a temporary basis in case of fire, storm, snow, earthquake, flood or other similar emergency; or

(iv) by a member of a board, committee, or council of the District of Columbia, paid on a per diem, meeting, or other fee basis,

(D) service performed in the employ of the Government of Guam (or any instrumentality which is wholly owned by such Government) by an employee properly classified as a temporary or intermittent employee, if such service is not covered by a retirement system established by a law of Guam; except that (i) the provisions of this subparagraph shall not be applicable to services performed by an elected official or a member of the legislature or in a hospital or penal institution by a patient or inmate thereof, and (ii) for purposes of this subparagraph, clauses (i) and (ii) of subparagraph (B) shall apply,

(E) service included under an agreement entered into pursuant to section 218 of the Social Security Act, or

(F) service in the employ of a State (other than the District of Columbia, Guam, or American Samoa), of any political subdivision thereof, or of any instrumentality of any one or more of the foregoing which is wholly owned thereby, by an individual who is not a member of a retirement system of such State, political subdivision, or instrumentality, except that the provisions of this subparagraph shall not be applicable to service performed—

(i) by an individual who is employed to relieve such individual from unemployment;

(ii) in a hospital, home, or other institution by a patient or inmate thereof;

(iii) by any individual as an employee serving on a temporary basis in case of fire, storm, snow, earthquake, flood, or other similar emergency;

(iv) by an election official or election worker if the remuneration paid in a calendar year for such service is less than $1,000 with respect to service performed during any calendar year commencing on or after January 1, 1995, ending on or before December 31, 1999, and the adjusted amount determined under section 218(c)(8)(B) of the Social Security Act for any calendar year commencing on or after January 1, 2000, with respect to service performed during such calendar year; or

(v) by an employee in a position compensated solely on a fee basis which is treated pursuant to section 1402(c)(2)(E) as a trade or business for purposes of inclusion of such fees in net earnings from self-employment;

for purposes of this subparagraph, except as provided in regulations prescribed by the Secretary, the term "retirement system" has the meaning given such term by section 218(b)(4) of the Social Security Act;

(8)(A) service performed by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by

such order, except that this subparagraph shall not apply to service performed by a member of such an order in the exercise of such duties, if an election of coverage under subsection (r) is in effect with respect to such order, or with respect to the autonomous subdivision thereof to which such member belongs;

(B) service performed in the employ of a church or qualified church-controlled organization if such church or organization has in effect an election under subsection (w), other than service in an unrelated trade or business (within the meaning of section 513(a));

(9) service performed by an individual as an employee or employee representative as defined in section 3231;

(10) service performed in the employ of—

(A) a school, college, or university, or

(B) an organization described in section 509(a)(3) if the organization is organized, and at all times thereafter is operated, exclusively for the benefit of, to perform the functions of, or to carry out the purposes of a school, college, or university and is operated, supervised, or controlled by or in connection with such school, college, or university, unless it is a school, college, or university of a State or a political subdivision thereof and the services performed in its employ by a student referred to in section 218(c)(5) of the Social Security Act are covered under the agreement between the Commissioner of Social Secu-

rity and such State entered into pursuant to section 218 of such Act;

if such service is performed by a student who is enrolled and regularly attending classes at such school, college, or university;

(11) service performed in the employ of a foreign government (including service as a consular or other officer or employee or a nondiplomatic representative);

(12) service performed in the employ of an instrumentality wholly owned by a foreign government—

(A) if the service is of a character similar to that performed in foreign countries by employees of the United States Government or of an instrumentality thereof; and

(B) if the Secretary of State shall certify to the Secretary of the Treasury that the foreign government, with respect to whose instrumentality and employees thereof exemption is claimed, grants an equivalent exemption with respect to similar service performed in the foreign country by employees of the United States Government and of instrumentalities thereof;

(13) service performed as a student nurse in the employ of a hospital or a nurses' training school by an individual who is enrolled and is regularly attending classes in a nurses' training school chartered or approved pursuant to State law;

(14)(A) service performed by an individual under the age of 18 in the delivery or distribution of news-

papers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution;

(B) service performed by an individual in, and at the time of, the sale of newspapers or magazines to ultimate consumers, under an arrangement under which the newspapers or magazines are to be sold by him at a fixed price, his compensation being based on the retention of the excess of such price over the amount at which the newspapers or magazines are charged to him, whether or not he is guaranteed a minimum amount of compensation for such service, or is entitled to be credited with the unsold newspapers or magazines turned back;

(15) service performed in the employ of an international organization, except service which constitutes "employment" under subsection (y);

(16) service performed by an individual under an arrangement with the owner or tenant of land pursuant to which—

(A) such individual undertakes to produce agricultural or horticultural commodities (including livestock, bees, poultry, and fur-bearing animals and wildlife) on such land,

(B) the agricultural or horticultural commodities produced by such individual, or the proceeds therefrom, are to be divided between such individual and such owner or tenant, and

(C) the amount of such individual's share depends on the amount of the agricultural or horticultural commodities produced;

[(17) Repealed. Pub. L. 113–295, div. A, title II, § 221(a)(99)(C)(i), Dec. 19, 2014, 128 Stat. 4052]

(18) service performed in Guam by a resident of the Republic of the Philippines while in Guam on a temporary basis as a nonimmigrant alien admitted to Guam pursuant to section 101(a)(15)(H)(ii) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(H)(ii));

(19) Service which is performed by a nonresident alien individual for the period he is temporarily present in the United States as a nonimmigrant under subparagraph (F), (J), (M), or (Q) of section 101(a)(15) of the Immigration and Nationality Act, as amended, and which is performed to carry out the purpose specified in subparagraph (F), (J), (M), or (Q), as the case may be;

(20) service (other than service described in paragraph (3)(A)) performed by an individual on a boat engaged in catching fish or other forms of aquatic animal life under an arrangement with the owner or operator of such boat pursuant to which—

(A) such individual does not receive any cash remuneration other than as provided in subparagraph (B) and other than cash remuneration—

(i) which does not exceed $100 per trip;

(ii) which is contingent on a minimum catch; and

(iii) which is paid solely for additional duties (such as mate, engineer, or cook) for which additional cash remuneration is traditional in the industry,

(B) such individual receives a share of the boat's (or the boats' in the case of a fishing operation involving more than one boat) catch of fish or other forms of aquatic animal life or a share of the proceeds from the sale of such catch, and

(C) the amount of such individual's share depends on the amount of the boat's (or the boats' in the case of a fishing operation involving more than one boat) catch of fish or other forms of aquatic animal life,

but only if the operating crew of such boat (or each boat from which the individual receives a share in the case of a fishing operation involving more than one boat) is normally made up of fewer than 10 individuals; or

(21) domestic service in a private home of the employer which—

(A) is performed in any year by an individual under the age of 18 during any portion of such year; and

(B) is not the principal occupation of such employee.

For purposes of paragraph (20), the operating crew of a boat shall be treated as normally made up of fewer than 10 individuals if the average size of the operating

crew on trips made during the preceding 4 calendar quarters consisted of fewer than 10 individuals.

7. 20 C.F.R. 211.2(a) provides:

PART 211—CREDITABLE RAILROAD COMPENSATION [UNDER THE RRA]

Definition of compensation.

(a) The term compensation means any form of payment made to an individual for services rendered as an employee for an employer; services performed as an employee representative; and any separation or subsistence allowance paid under any benefit schedule provided in conformance with title VII of the Regional Rail Reorganization Act of 1973 and any termination allowance paid under section 702 of that Act. Compensation may be paid as money, a commodity, a service or a privilege. However, if an employee is to be paid in any form other than money, the employer and employee must agree before the service is performed upon the following:

(1) The value of the commodity, service or privilege; and

(2) That the amount agreed upon to be paid may be paid in the form of the commodity, service or privilege.

8. 26 C.F.R. 410.5 (1938) provides:

PART 410—EMPLOYERS' TAX, EMPLOYEES' TAX, AND EMPLOYEE REPRESENTATIVES' TAX UNDER THE CARRIERS TAXING ACT OF 1937 [RRTA]

Definition of "compensation."

The term "compensation" or in something which may be means all remuneration in money, used in lieu of money (scrip and merchandise orders, for example), earned by an individual for services performed as an employee for one or more employers, or as an employee representative. The term is not confined to amounts earned or paid for active service but includes amounts earned or paid for periods during which the employee or employee representative is absent from active service. The term does not include tips, or the voluntary employer of the employee's tax, without the deduction of such tax to when compensation from the remuneration of the employee. (As to when compensation is earned, see § 410.7.)*†34

9. 26 C.F.R. 31.3231(e)-1(a)(1) provides:

Subpart C—Railroad Retirement Tax Act (Chapter 22, Internal Revenue Code of 1954)

Compensation.

(a) *Definition*—(1) The term *compensation* has the same meaning as the term *wages* in section 3121(a),

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* For statutory citation, see note to § 410.0.

† For source citation, see note to § 410.1.

determined without regard to section 3121(b)(9), except as specifically limited by the Railroad Retirement Tax Act (chapter 22 of the Internal Revenue Code) or regulation. The Commissioner may provide any additional guidance that may be necessary or appropriate in applying the definitions of sections 3121(a) and 3231(e).